Supreme Court, U.S.
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85-1303
No._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

IN RE GUARDIANSHIP OF
SHARON KOWALSKI, WARD

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTIONS PRESENTED

1. Does a handicapped person have a right to be represented by counsel of her choice in judicial proceedings in which determinations will be made as to her legal capacity and her rights of privacy and free association, where she has retained that counsel herself?

2. May state courts deny a handicapped person the right to be represented by retained counsel of choice, without conducting an evidentiary hearing as to facts surrounding retention of counsel?

LIST OF PARTIES

The parties to the proceeding below include Sharon Kowalski, Donald Kowalski, and Karen Thompson.

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OCTOBER TERM 1985

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IN RE GUARDIANSHIP OF
SHARON KOWALSKI, WARD

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Sharon Kowalski asks that a writ of certiorari issue to review the judgments of the Supreme Court of Minnesota and the Minnesota Court of Appeals.

OPINIONS BELOW

Applicable portions of the orders of the Supreme Court of Minnesota (A-1), the Minnesota Court of Appeals (A-4), and the Probate Court for Sherburne County, State of Minnesota (A-12), are unpublished and appear in the appendix.

JURISDICTION

The order of the Supreme Court of Minnesota was entered on November 4, 1985. A timely petition for rehearing was denied on November 25, 1985, and this petition for certiorari was filed within 90 days of both dates. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE AND THE FACTS

A. Background Information.

Sharon Kowalski is twenty-nine years old. On November 13, 1983, she was injured in an automobile accident, and her physical and mental abilities were impaired. Sharon is now confined to a wheelchair and cannot vocalize her thoughts. She communicates by typing on an electric typewriter, by using hand signals, and by pointing to written words. Sharon currently resides at the Leisure Hills nursing home in Hibbing, Minnesota.

Shortly after the accident, Sharon became the subject of a heated legal battle concerning the terms of her conservatorship, residency, treatment, and accessibility of visitors. The parties to that dispute are Sharon's parents, Donald and Della Kowalski, and her friend and housemate, Karen Thompson, with whom Sharon had lived for approximately four years prior to the accident. The legal dispute began when Ms. Thompson filed a petition to be appointed Sharon's guardian and Mr. Kowalski cross-petitioned to be appointed guardian. Because of a need for counsel in these guardianship proceedings, the Sherburne County probate court appointed Thomas D. Hayes, Esq. of rural Monticello, Minnesota, as her counsel.

In its initial order, the probate court found that both Donald Kowalski and Karen Thompson had significant relationships

with Sharon. (A-9) The court also found that Ms. Thompson and Mr. Kowalski were both equally qualified to be appointed guardian for Sharon, but appointed Mr. Kowalski guardian in light of Ms. Thompson's agreement to his appointment. (A-9-10) The probate court also imposed several significant limitations and restrictions on Mr. Kowalski's power. (A-10) Ms. Thompson was granted equal access to Sharon's medical and financial information, equal rights to consult with Sharon's physicians, and equal rights to visit Sharon. Mr. Kowalski also did not have the right to determine who Sharon could visit or where she should reside. (A-10-11)

Despite the probate court's action, Mr. Kowalski brought numerous motions to restrict Ms. Thompson's involvement in Sharon's care and to terminate any contact between Ms. Thompson and Sharon. In response, Ms. Thompson sought to have Mr. Kowalski removed as guardian. These various motions were, for the most part, denied and the original order remained in place. Mr. Hayes continued to represent Sharon in what had evolved into major litigation.

B. Sharon's Retention Of Her Own Counsel.

The facts giving rise to Sharon's retention of her own counsel follow:

On May 30, 1985, Janlori Goldman, Legal Counsel and Assistant Director of the Minnesota Civil Liberties Union (the "MCLU"), visited Sharon at the Park Point Manor Nursing Home ("Park Point") in Duluth, Minnesota. (A-18) Ms. Goldman communicated with Sharon by orally asking her questions. Sharon responded by typing answers on an electric typewriter. (A-19)

During that visit, Ms. Goldman explained the nature and purpose of the MCLU to Sharon. Sharon indicated she under-

stood. (*Id.*) Ms. Goldman then asked Sharon if she believed her wishes were being made known to the probate court. Sharon typed "No". (*Id.*) Finally, Ms. Goldman asked Sharon if she wanted Ms. Goldman to represent her in order to make Sharon's wishes known to the probate court. Sharon typed "Yes". (*Id.*)

On June 12, 1985, Ms. Goldman again visited Sharon at Park Point. Also present during this visit, among others, was an attorney from the law firm of Faegre & Benson, Amy Bromberg, whom the MCLU had contacted to act as a volunteer attorney in this matter. Ms. Bromberg communicated with Sharon by orally asking her questions and Sharon responded by typing answers on an electric typewriter. (A-22) During this visit, Ms. Bromberg asked Sharon what her wishes were regarding representation in the probate court proceedings. Sharon again indicated she did not believe her wishes were being made known to the probate court. Sharon again indicated she wished to have the MCLU by Ms. Bromberg represent her in those proceedings. (*Id.*)

Based upon Sharon's requests, on June 20, 1985, a Notice of Appearance was served and filed in the probate court entering the appearance of the MCLU by Faegre & Benson as counsel on behalf of Sharon. (A-27)

Ms. Bromberg visited Sharon a second time on June 24, 1985. Sharon reaffirmed her retention of Ms. Bromberg and the MCLU during that visit. (A-23)

On June 25, 1985, Mr. Kowalski's attorney wrote the probate court: "I also wish to state to the Court that I received a copy of notice of appearance by Amy Bromberg and Brian B. O'Neill, attorneys representing the Minnesota Civil Liberties Union. I did have a conversation after receiving this notice with Ms. Bromberg, and told her I welcomed her entry into this case, . . ." (A-31)

C. The Denial Of Sharon's Constitutional Right To Be Represented By Her Counsel Of Choice.

On July 22, 1985, the probate court issued a second order that, among other things, declared Sharon an incapacitated person, removed the safeguards in the earlier order that had protected Sharon's freedom to associate with visitors of her choice, and granted Mr. Kowalski the power to determine who could visit Sharon. (A-12) The probate court's findings included boilerplate determinations that Sharon lacked the ability to make responsible decisions, was unable to manage her estate, and was incapable of consenting "to necessary medical or other professional care, counseling, or treatment." (A-14) *See* Minn. Stat. § 525.56. The probate court did *not* make a determination that Sharon was incapable of independently retaining counsel.

Shortly thereafter, Mr. Kowalski moved Sharon to another care facility and terminated all contact between Sharon, Ms. Thompson, and Faegre & Benson. (A-24-25) Despite subsequent requests, Mr. Kowalski has refused to allow Sharon's attorneys of choice to visit her. (A-26)

On August 7, 1985, a Notice of Appeal from the probate court's second order was filed by Sharon's personal attorneys, the MCLU by Faegre & Benson. On August 22, 1985, a second and joint Notice of Appeal was filed by Sharon's personal attorneys and her court-appointed attorney, Mr. Hayes. Both appeals sought review of the probate court order insofar as it declared Sharon totally incapacitated, appointed Donald Kowalski her guardian, and deprived Sharon of the power to determine with whom she may visit.

Sharon now had both court-appointed counsel and her personal attorneys aiding in her defense. Nevertheless, the guardian moved to dismiss the appeals as having been brought by

counsel "without standing" to represent Sharon. Sharon responded with affidavits setting forth the facts surrounding retention. (A-18, 21) Mr. Hayes, Sharon's court-appointed attorney, opposed the guardian's efforts to disqualify Sharon's chosen counsel. The only record proof concerning retention were the affidavits submitted in Sharon's behalf.

On September 13, 1985, the Minnesota Court of Appeals, *inter alia*, rejected Sharon's retention of her personal attorneys by dismissing the first appeal. The Minnesota Court of Appeals did so without record support: "It *appears* that the trial court has determined the ward is incapable of independently retaining counsel, . . ." (A-5) (emphasis added)

The Minnesota Court of Appeals also rejected her court-appointed attorney's decision to associate with counsel specialized in the legal issues raised in the second appeal: Sharon's constitutional rights. (A-6) "[C]ourt appointed counsel had *apparently* not been authorized to associate with the MCLU attorneys; . . ." (A-5) (emphasis added)

Petitions for review and for extraordinary relief were timely filed with the Supreme Court of Minnesota. Mr. Hayes, who practices in a small town with two partners, informed the Minnesota Supreme Court that "cognizant of the resources necessary to conduct complicated constitutional litigation, and cognizant of the fact that few attorneys are afforded the luxury of developing a specialty in constitutional litigation, [he had] chose[n] to associate with the MCLU and Faegre & Benson."

The Minnesota Supreme Court summarily denied all petitions on November 4, 1985. (A-3) A timely petition for rehearing was filed on November 7, 1985, which was also summarily denied on November 25, 1985. (A-3-4)

The orders of the Minnesota appeals courts violated Sharon's federal constitutional rights, as well as state law. Pursuant to the probate court order and Minnesota Statute § 525.56, subd. 3(5), Sharon has the power to approve of "contracts for necessities." (A-8) Legal services have long been considered necessities. *See, e.g., In re Schulte's Guardianship*, 231 Iowa 237, 1 N.W.2d 193 (1941); *Lyon v. Freshour's Estate*, 174 Mich. 114, 140 N.W. 517 (1913). Furthermore, Minnesota Statute § 525.56, subd. 3(6), recognizes that supervisory power over a ward in a manner that limits civil rights and restricts personal freedom can be exercised "only to the extent necessary to provide needed care and services." Lastly, Sharon's right to select counsel *of her own choosing* is reflected in Minnesota Statutes § 525.55, subd. 2 (dealing with the right to counsel in initial commitment proceedings); and Minnesota Statute § 525.58, subd. 2 (dealing with the right to counsel for petitions for restoration of capacity).

The Minnesota appellate proceedings concerning Sharon's capacity and her rights of association continue to date. Because of the continuing jurisdiction of a probate court, Sharon may be subject to the control of that court for some years. As a result of the Minnesota appellate decisions, Sharon has been denied her right to choose counsel, a right particularly important to her in the continuing legal confrontations over both her capacity and her care.

The uncontested record before the Minnesota appeals courts was that Sharon was dissatisfied with her court-appointed representation in the ongoing litigation with her guardian. Sharon retained her own counsel on three separate occasions because she was of the view that her wishes were not being made known to the probate court. In addition, her court-appointed counsel desired the aid and assistance of the MCLU by Faegre & Benson.

REASONS FOR GRANTING THE WRIT

THE DECISIONS OF THE MINNESOTA APPELLATE COURTS VIOLATE SHARON KOWALSKI'S DUE PROCESS RIGHTS BY PREVENTING HER FROM BEING REPRESENTED BY HER SELF-RETAINED COUNSEL OF CHOICE

The Minnesota appeals courts' position was: A person adjudged incapacitated is prohibited from retaining her own counsel to argue about the fact of capacity, the scope of capacity, or the scope of confinement resulting from the adjudication of incapacity.

This Court's opinions on the right to counsel have rarely addressed the question of a person's right to be represented by counsel of choice, when retained by the individual. The great conflicts of the last few decades have dealt primarily with court-appointed counsel. *See, e.g., Vitek v. Jones,* 445 U.S. 480, 492, 495, 496 (1980); *Argersinger v. Hamlin,* 407 U.S. 25, 31, 32 (1972); *In re Gault,* 387 U.S. 1, 35, 41 (1967); *Specht v. Patterson,* 386 U.S. 605, 610 (1967). There is an obvious reason for this focus: the absolute right of an individual to speak through counsel *that the individual retains* has been with us since the Revolution. *See Faretta v. California,* 422 U.S. 806, 833 (1975). That right has rarely been challenged.

The decisions of the Minnesota appellate courts, however, not only challenge that right, but effectively deny Sharon her constitutional due process right to be represented by her self-retained counsel of choice. There is no decision of this Court in which this issue is addressed. However, analogous decisions of this Court make clear that the actions of the Minnesota appellate courts cannot be allowed to stand.

A. The Court Has Held That The Handicapped Possess Substantial Due Process Rights.

The Court has repeatedly held that those subject to commitment proceedings and the ensuing commitment have substantial due process rights, including a right to counsel. *E.g.*, *Parham v. J.R.*, 442 U.S. 584, 627 (1979); *Addington v. Texas*, 441 U.S. 418, 425 (1979). The Court also has recently made it clear that the mentally handicapped have a right to rehabilitation. *Youngberg v. Romeo*, 457 U.S. 307, 315-316, 317, 318, 321-322 (1982). Usually, the issue is what process is due. *Id.*

In the first modern case dealing with the due process rights of the handicapped, the Court concluded:

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.

Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 276-277 (1940); *see Vitek v. Jones*, 445 U.S. at 492.

The decisions of the Minnesota appellate courts, however, ignore this caution by denying Sharon's right to be represented by her counsel of choice. What fairness can there be in a proceeding where a handicapped individual is not allowed to have her positions argued by the champion she has selected and hired?

B. The Court Has Held That Even Those Accused Of A Crime Have A Right To Be Represented By Their Counsel Of Choice.

In *Faretta v. California*, 422 U.S. 806 (1975), the Court affirmed the right of an accused to be represented by his counsel of choice. In that case, the accused requested that he be permitted to represent himself at trial. *Id.* at 807. The Court refused to sanction the trial court's attempt to compel the accused to be represented by a public defender. *Id.* at 810. In so ruling the Court noted that "[t]he value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them." *Id.* at 833 (footnote omitted); *see Chandler v. Fretag*, 348 U.S. 3 (1954) (denial to accused felon of opportunity to obtain counsel of choice violates due process clause of fourteenth amendment; the right to be heard through one's own counsel is unqualified). Unwanted counsel is no counsel at all. 422 U.S. at 820-821, 834.

Faretta and *Chandler* stand for a basic legal proposition:

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel *when desired and provided by the party asserting the right.*
>
> * * *
>
> If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.*

Powell v. Alabama, 287 U.S. 45, 53, 68-69 (1932) (emphasis added). The handicapped have a need for protection greater than those accused of crimes. Subjected to legal proceedings not dissimilar from criminal proceedings, they are often voiceless. In addition, the impaired are disenfranchised through no fault of their own. The impaired ought to have rights greater than those accused of crimes. *Youngberg v. Romeo*, 457 U.S. at 315-316, 321-322.

C. This Case Presents An Important Unresolved Question Of Constitutional Law.

As previously mentioned, the Court has yet to address the question of whether the handicapped have a constitutional right to be represented by their self-retained counsel of choice. This case squarely presents that issue.

Sharon was interviewed on three separate occasions by a legal representative of the MCLU and the Minneapolis law firm of Faegre & Benson. Sharon, in response to questioning, indicated on each occasion she did not believe her wishes were being made known to the probate court and that she wanted assistance in the court proceedings. Each time Sharon indicated she wanted to retain the MCLU by Faegre & Benson as her attorneys. Counsel believed they had been retained and filed a notice of appearance in probate court. To this date, Sharon's court-appointed lawyer also believes Sharon retained the MCLU by Faegre & Benson.

The Minnesota Court of Appeals obviously disagrees: "It *appears* the trial court has determined the ward is incapable of independently retaining counsel . . . . [C]ourt appointed counsel had *apparently* not been authorized to associate with the MCLU attorneys." (A-5) (emphasis added) The Minnesota Supreme Court's summary denial of review added nothing to this analysis.

On the basis of these two "apparentlys", and without an evidentiary hearing, the appellate courts abrogated Sharon's right to be represented by counsel she had retained. The Minnesota appellate courts attacked counsel with a notable lack of process. No evidentiary hearing was held on the question of retention. There were no findings by the appellate courts on Sharon's ability to retain counsel. There was no record proof contrary to the fact of retention. And there was no recognition of the importance of counsel of choice in an adversarial system. The appellate courts presumed that Sharon had neither the capacity nor the right to retain counsel.

Sharon's right to counsel presents no issues concerning rights to government sponsored representation. Sharon retained volunteer counsel herself and at no expense to the state. Sharon's right to counsel presents no danger to the administration of commitment proceedings. A right to retain counsel results in the ability of an individual to challenge, in a meaningful fashion, the aspects of her very real confinement. The challenge takes place in the controlled environment of the court system, and is conducted in association with her court-appointed lawyer.

The dilemma this case presents is unusual. A superficial response to Sharon's retention of counsel is that she may lack the capacity to hire a lawyer. However, such a response ignores the fact that without the right to retain counsel, basic procedural and substantive rights are afforded in name only. By way of example, the right to a hearing rings hollow in the ears of one who does not believe court-appointed counsel is making her wishes known to the court.

The right of an individual to choose an attorney to represent her in court proceedings is a right upon which all other rights are based. The appearance of the personal attorney

springs from the fundamental right of the handicapped person, in a manner of gravity and consequence, to have access to all reasonable facilities for the prosecution of the competency inquiry.

By denying Sharon's right to be represented by her personal retained counsel, the Minnesota appellate courts have forced her to be represented by court-appointed counsel, a concept alien to the intent of the Founding Fathers. *See Faretta v. California*, 422 U.S. at 833. A handicapped individual should not have to rely on the benevolence of government in choosing counsel—the only way a handicapped individual can be guaranteed a fair champion is to have the right to select that champion.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decisions of the Supreme Court of Minnesota and the Minnesota Court of Appeals.

Dated: January 30, 1986.

Respectfully submitted,

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IN RE GUARDIANSHIP OF
SHARON KOWALSKI, WARD

APPENDIX TO PETITION FOR CERTIORARI

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STATE OF MINNESOTA
IN SUPREME COURT

C1-85-1502, C2-85-1590,
C1-85-1595 and C5-85-1664

IN RE GUARDIANSHIP OF:
SHARON KOWALSKI, WARD.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petitions for a writ of prohibition, writ of mandamus and for further review be, and the same are, denied.

Dated: 11-4-85.

By the Court:
DOUGLAS K. AMDAHL
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT

C1-85-1502

IN RE: GUARDIANSHIP OF
SHARON KOWALSKI, WARD.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that Sharon Kowalski's motion for reconsideration of the denial of her petition for further review be, and the same is, denied.

Dated: November 25, 1985.

By the Court:
LAWRENCE R. YETKA
Associate Justice

STATE OF MINNESOTA
IN COURT OF APPEALS

No. C1-85-1502
No. C2-85-1590
No. C1-85-1595

IN RE: GUARDIANSHIP OF
SHARON KOWALSKI, WARD.

ORDER

Considered and decided by Popovich, Chief J., Wozniak, J. and Huspeni, Judge.

Based upon the file, records and proceedings herein, and because:

1. By order on July 23, 1985, the trial court gave the guardian the power to determine who may visit the ward, denied respondent Thompson's motion to remove the guardian, and took other action not germane to this order; and

2. Appeal C1-85-1502 was filed by volunteer attorneys for the Minnesota Civil Liberties Union (MCLU) on behalf of the ward on August 8; and

3. A second notice of appeal (C1-85-1595), signed by the ward's court-appointed counsel and the MCLU attorneys, was filed on August 22; and

4. Respondent Thompson also petitioned for discretionary review (C2-85-1590) of the July 23 order; and

5. The guardian moves to dismiss the ward's appeal as taken from a non-appealable order; and

6. An order refusing to remove a representative is appealable to this court, Minn. Stat. § 525.71(2) (1984); and

7. The July 23 order denied the motion of respondent Thompson to remove the guardian and it is appealable; and

8. The guardian also challenges the standing of MCLU attorneys to represent the ward; and

9. The trial court found the ward is incapable of consenting to medical or professional care or of approving any contract; and

10. MCLU attorneys were not appointed by the trial court to represent the ward and court-appointed counsel had apparently not been authorized to associate with the MCLU attorneys; and

11. It appears the trial court has determined the ward is incapable of independently retaining counsel, but participation of the MCLU as amicus curiae may be helpful to resolution of the appeal; and

12. Probate orders, judgments, and decrees are suspended pending appeal "until the appeal is determined or the court of appeals orders otherwise." Minn. Stat. § 525.714; and

13. The guardian moves this court to give the July 23 order effect pending appeal, despite the statutory language; and

14. The statute appears to have been intended to prevent distribution of financial assets pending appeal; and

15. While there is evidence to support the position of each party on this motion, the trial court found the on-going conflict between the ward's parents and respondent Thompson adversely affects the ward and "elimination of that conflict . . . is in the best interest of the ward *at the present time*"; and

16. The trial court was presented with virtually all the evidence presented to this court on this motion and concluded that elimination of the conflict was necessary; and

17. We defer to the determination of the trial court at this time, while not expressing any opinion on the merits of this appeal;

IT IS HEREBY ORDERED:

1. The guardian's motion to dismiss as taken from a non-appealable order is denied.

2. Appeal C1-85-1502 is dismissed as taken by counsel who lacked authority to represent the ward.

3. The petition for discretionary review (C2-85-1590) filed by Karen Thompson is denied. Thompson may assert her position on the July 23 order in appeal C1-85-1595 and may file a notice of review pursuant to Minn. R. Civ. App. P. 106, if appropriate.

4. Appeal C1-85-1595 will be treated as an appeal by the ward, represented by her court-appointed counsel.

5. The MCLU may file an amicus brief, not to exceed 20 pages, within 30 days after delivery of the transcript. *See* Minn. R. Civ. App. P. 132.01, subd. 3.

6. The July 23 order shall be given effect pending resolution of this appeal.

7. Briefing on the merits of this appeal will proceed in accordance with Minn. R. Civ. App. P. 131.01, after the transcript has been delivered.

Dated: 9-13-85

BY THE COURT
PETER S. POPOVICH
Chief Judge
D. D. WOZNIAK
Judge

STATE OF MINNESOTA
COUNTY OF SHERBURNE

IN DISTRICT COURT
PROBATE DIVISION

IN RE: THE GUARDIANSHIP OF:
SHARON KOWALSKI, WARD.

ORDER APPOINTING GENERAL GUARDIAN
OF THE PERSON AND ESTATE

This matter came duly on for hearing on April 25, 1984 on the petition of Karen Thompson seeking appointment of a guardian for Sharon Kowalski. Petitioner appeared personally and by and through her attorney, Elizabeth A. Ristvedt, Esq. The above named ward appeared through her attorney, Thomas D. Hayes, Esq. Donald and Della Kowalski appeared personally in opposition to the petition of Karen Thompson, and by and through their attorney, Kevin Spellacy. The Court having considered the evidence and being fully advised in the premises now makes the following:

FINDINGS OF FACT

1. The Ward was unable to attend the hearing by reason of medical condition as evidenced by a written statement from a licensed physician.

2. The Ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her person.

3. The Ward has demonstrated behavioral deficits evidencing inability to meet her needs for medical care, nutrition, clothing, shelter, or safety.

4. The Ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her estate or financial decisions.

5. The Ward has demonstrated behavioral deficits evidencing inability to manage her estate.

6. The Ward has property which will be dissipated without proper management and funds are needed for the care, support, and welfare of the Ward.

7. No appropriate alternative to guardianship exists which is less restrictive of civil rights and liberties, including any protective arrangement under M.S. 525.54, Subd. 7.

8. The Ward is incapable of exercising the following rights and powers:

a. To establish her place of abode.

b. To determine her food, clothing, shelter, health care, social and recreational requirements, and training, educational and rehabilitation requirements.

c. To dispose of her clothing, personal effects, vehicles, furniture or other property.

d. To consent to necessary medical or other professional care, counseling, treatment, or service.

e. To approve or withhold approval of any contract, except for necessities which the ward may make or wish to make.

f. To pay reasonable charges for the support, maintenance and education of the ward.

g. To pay any debts of the ward.

h. To possess and manage her estate, collect all debts and claims in her favor or compromise them, to invest all funds not needed for current debts and charges, and to represent herself in court proceedings or institute suit.

i. To vote.

9. The Ward is not a patient of a State Hospital for the mentally ill or a mentally retarded or dependent or neglected Ward of the Commissioner of Public Welfare, or under the temporary custody of the Commissioner of Public Welfare.

10. The Ward is in need of a guardian to supervise and to protect her person and estate.

11. The Court recognizes that Karen Thompson and Donald and Della Kowalski each have a significant relationship with the Ward, Sharon Kowalski, and finds each to be a suitable and qualified person to discharge the trust. However, in light of the difficulties existing between them the Court is unwilling to appoint joint guardians. Therefore, the Petitioner, Karen Thompson, agrees to the appointment of Donald Kowalski as guardian with no recognition that he is the most suitable and best qualified among those available and willing to discharge the trust, but is willing to accept the Court's appointment of Donald Kowalski under certain conditions and restrictions in order to avoid a contested hearing in the matter, which might not be in Sharon's best interest and in order to make every effort to resolve the difficulties existing between them.

CONCLUSIONS OF LAW

1. Sharon Kowalski is an incapacitated person.

2. A guardian of the person and estate of Sharon Kowalski should be appointed.

Now, Therefore, IT IS ORDERED:

1. That Donald Kowalski be and hereby is appointed guardian of the person and estate of Sharon Kowalski with all the powers enumerated in M.S. 525.56 Subds. 3 (and 4) with the following conditions and restrictions:

a. Sharon Kowalski will not be moved from the St. Cloud Hospital unless and until the medical personnel involved in Sharon's care and treatment deem it to be in Sharon's best interest. Sharon Kowalski can then only be moved to a location that is (1) approved by the medical personnel and deemed appropriate, and (2) approved by

the Court unless the Kowalskis and Thompson agree on the proposed location. If there is no agreement, the Court will then hear the matter of Sharon's relocation giving consideration to Sharon's best interest without giving the guardian's wishes any additional weight by virtue of his role as guardian.

b. Both Thompson and the Donald Kowalskis shall have equal access to the medical and financial information regarding the ward and shall have equal right to consult with medical and financial personnel.

c. Both Thompson and the Donald Kowalskis shall have equal access to the ward Sharon Kowalski. Visitation shall continue as scheduled previously by order of this court. The parties may modify said schedule upon agreement. If the parties are unable to agree, Dr. Steven Vincent, Psychologist at St. Cloud Hospital, shall attempt to mediate the question. If he is unable to mediate a satisfactory compromise the parties may seek to have the Court resolve the matter. Pending the resolution of any visitation questions, visitation shall remain as it has been previously established.

d. Each party recognizes Sharon's need for visitation and in Sharon's best interest they agree that if either of the parties will be out of town or otherwise unavailable for visitation, they will so inform the other party and indicate the estimated length of time they will be unavailable for visitation. Each party will attempt to give the other as much notice as possible of their unavailability for visitation. A message will be left in an envelope in a conspicuous location in Sharon's room.

e. It is the Court's desire and recommendation that both parties continue to work on improving the commu-

nication and relationship between them so that Sharon is not adversely affected. In the Court's opinion psychological counseling is one of the best ways of attempting to alleviate and deal with the conflict between the parties and to teach them to deal effectively and realistically with the situation and Sharon's condition.

f. All personal property of the ward shall remain in its present location until such time as the ward has actual need of the property.

2. That letters of guardianship issue to Donald Kowalski upon filing an oath and a bond in the amount of $10,000.00.

3. The Court directs that Karen Thompson is an additional person to whom notice of proceedings must be given.

4. That the estate of Sharon Kowalski shall pay Elizabeth A. Ristvedt and Kevin Spellacy $400.00 each towards their fees in this matter.

Dated: April 25, 1984.

By the Court:
BRUCE R. DOUGLAS
Judge

STATE OF MINNESOTA
COUNTY OF SHERBURNE

DISTRICT COURT
PROBATE DIVISION
TENTH JUDICIAL DISTRICT

IN RE: GUARDIANSHIP OF
SHARON KOWALSKI, WARD.

File No. 4497

ORDER CONFIRMING APPOINTMENT OF GUARDIAN OF THE PERSON AND ESTATE AND OTHER MATTERS

The above entitled matter came duly on for hearing before the Hon. Bruce R. Douglas, Judge of District Court, on May 3, 1985 in the Sherburne County Courthouse, Elk River, Minnesota, and on May 9, 1985 in the Wright County Courthouse, Buffalo, Minnesota, pursuant to various motions as described below: .

Donald Kowalski, Guardian, appeared personally and by his attorneys, Jack Fena and Kevin A. Spellacy. Thomas D. Hayes appeared as attorney for Sharon Kowalski, ward, who was not present. Karen Thompson appeared personally and by her attorney Elizabeth A. Ristvedt. James W. Ingison, Attorney, appeared on behalf of Park Point Manor Nursing Home.

Park Point Manor Nursing Home moved that the Court grant reimbursement of attorney fees and professional staff fees pursuant to M.S. 525.703.

Donald Kowalski, guardian, moved that the guardian's annual account through March 31, 1985 be approved; that the guardian be reimbursed for expenses and fees in the sum of $12,000.00 for the period from February, 1984, through April, 1985; that Karen Thompson have no further visitation or con-

tact with Sharon Kowalski, ward; that Karen Thompson be restrained from all contact with the medical or nursing home staff or interference with them regarding Sharon Kowalski, ward; and that Karen Thompson be found in contempt for failure to account for personal property of Sharon Kowalski, ward.

Karen Thompson moved that Donald Kowalski be removed as guardian for Sharon Kowalski; that the guardian's request for expenses and fees be denied; that Karen Thompson be awarded attorney fees for harassment and bad faith; and that Karen Thompson be granted continued visitation with Sharon Kowalski and the right to temporary visits with Sharon Kowalski away from the nursing home.

Thomas D. Hayes moved on behalf of the ward that the Court order that the video tapes and photographs of the ward which have been or which will be filed with the Court, not be reproduced, viewed or disseminated beyond the parties to this litigation without Court permission.

Evidence was offered and received.

Based on the papers, pleadings, affidavits on file herein, the evidence received and the arguments of counsel, and being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

1. The ward was unable to attend the hearing by reason of medical condition as evidenced by written statements from licensed physicians.

2. The ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her person.

3. The ward has demonstrated behavioral deficits evidencing inability to meet her needs for medical care, nutrition, clothing, shelter or safety.

4. The ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her estate or financial decisions.

5. The ward has demonstrated behavioral deficits evidencing inability to manage her estate.

6. The ward has property which will be dissipated without proper management, and funds are needed for the care, support and welfare of the ward and/or those entitled to the support of the ward.

7. No appropriate alternative to guardianship exists which is less restrictive of civil rights and liberties, including any protective arrangement under M.S. 525.54 Subd. 7.

8. The ward is incapable of exercising the following rights and powers:

a. To establish her place of abode.

b. To determine her food, clothing, shelter, health care, social and recreational requirements, and training, educational and rehabilitation requirements.

c. To dispose of her clothing, personal effects, vehicles, furniture or other property.

d. To consent to necessary medical or other professional care, counseling, treatment or service.

e. To approve or withhold approval of any contract, except for necessities which the ward may make or wish to make.

f. To pay reasonable charges for the support, maintenance and education of the ward.

g. To pay any debts of the ward.

h. To possess and manage her estate, collect all debts and claims in her favor or compromise them, to invest all funds not needed for current debts and

charges, and to represent herself in court proceeding or institute suits.

i. To vote.

9. The ward is not a patient of a State Hospital for the mentally ill or a mentally retarded or dependent ward of the Commissioner of Public Welfare, or under the temporary custody of the Commissioner of Public Welfare.

10. The ward is in need of a guardian to supervise and to protect her person and estate.

11. Donald Kowalski is the most suitable and best qualified among those available and willing to discharge the trust.

12. The ward's ability to respond or communicate had been inconsistent and, at times, unreliable, which situation may or may not improve.

13. The guardian has not filed a complete inventory as required by Minn. Stat. 525.521.

14. Karen Thompson has provided to the guardian a list of personal property in her possession belonging to the ward.

15. The Court has not been provided with information regarding outstanding debts or claims against the ward or her estate.

16. Park Point Manor Nursing Home has not filed a claim with the guardian regarding the attorney fees and professional staff fees it requests.

17. The ongoing conflict between Don and Della Kowalski and Karen Thompson adversely affects the welfare of Sharon Kowalski at the present time; and elimination of that conflict and its adverse affect on the ward is in the best interest of the ward at the present time.

18. None of the parties herein have acted in bad faith so as to justify an award of attorney fees based thereon.

19. All counsel and parties agreed to continue indefinitely Donald Kowalski's request as guardian for reimbursement of expenses and fees.

20. None of the parties nor their counsel objected to the request by Mr. Hayes on behalf of the ward, that access to and use of the video tapes and photographs of the ward be restricted without Court permission.

CONCLUSIONS OF LAW

1. Sharon Kowalski is an incapacitated person.

2. The appointment of a guardian of the person and estate of Sharon Kowalski continues to be necessary.

3. The Court is unable to determine whether to grant the various requests for fees and expenses to be paid from the estate of the ward, based upon the insufficiency of the financial information in the record.

NOW THEREFORE, IT IS HEREBY ORDERED:

1. That the appointment of Donald Kowalski as guardian of the person and estate of Sharon Kowalski be and hereby is confirmed and continued in all respects with all of the powers enumerated in Minn. Stat. 525.56 Subds 3 and 4, without limitation or condition.

2. That the letters of guardianship previously issued Donald Kowalski be and hereby are continued in effect without filing an additional oath.

3. That the bond presently filed by the guardian in the amount of $10,000.00 shall remain in force and effect and shall be maintained.

4. That the conditions and restrictions in the order of this Court dated April 25, 1985, as listed in paragraph 1 (a) through paragraph 1 (f) of said order are hereby rescinded and vacated and shall be of no further effect.

5. That the guardian's duties and powers include the duty to provide for the ward's social and recreational requirements (see Minn. Stat. 525.56, Subd. 3 (2); and that the guardian herein shall have the power to determine who may visit Sharon Kowalski, and the times and duration of such visitation. The guardian shall consider, regarding all visitation decisions, that the primary consideration is the best interest of the ward and any reliably expressed wishes of the ward, both of which may change from time to time. The guardian shall also consider regarding visitation, the recommendations of medical and health care personnel and the needs and desires of the institution wherein the ward resides.

6. That the Court reserves decision on Park Point Manor's motion for reimbursement of attorney fees and professional staff fees without prejudice.

7. That the Court reserves decision on the annual account filed by the guardian, and on the guardian's request for reimbursement of fees and expenses.

8. That Karen Thompson shall no longer have access to medical and financial information and records regarding the ward nor the right to consult with or direct medical and financial personnel regarding the ward.

9. That Donald Kowalski's motion to find Karen Thompson in contempt is hereby denied; provided that Karen Thompson shall forthwith account to the guardian for all property in her possession, which belongs to the ward, and shall follow the guardian's direction regarding delivery, storage or preservation of said property.

10. That Karen Thompson's motions for removal of Donald Kowalski as guardian and for payment of her attorney fees are denied in all respects.

11. That Karen Thompson's motion regarding visitation and contact with Sharon Kowalski is denied except as otherwise ordered and provided for herein in Paragraph (5).

12. That the motion made on behalf of the ward regarding video tapes and photographs of the ward is granted, and it is hereby ordered that the video tapes and photographs of the ward which are on file herein as of the date of this order shall not be copied, reproduced, or duplicated without prior written approval of the Court granted upon notice and motion; and further that said items shall not be viewed or disseminated beyond the parties to this litigation without Court permission.

13. The guardian is ordered to file an inventory as required by Minn. Stat. 525.561 forthwith; and to file a listing of claims made or potential claims against the ward or her estate.

Dated: July 22, 1985.

BRUCE R. DOUGLAS
District Judge

STATE OF MINNESOTA — DISTRICT COURT, PROBATE DIVISION

County of Sherburne — Tenth Judicial District

File No. 4497

IN RE: GUARDIANSHIP OF
SHARON KOWALSKI, WARD

AFFIDAVIT OF
JANLORI GOLDMAN

STATE OF MINNESOTA
COUNTY OF HENNEPIN—ss.

Janlori Goldman, being duly sworn upon oath, deposes and says:

1. I am Legal Counsel and Assistant Director of the Minnesota Civil Liberties Union (the "MCLU") and have personal knowledge of the matters set forth in this Affidavit. I am submitting this Affidavit in support of the Motion of Sharon Kowalski, Ward and her attorneys, Faegre & Benson and the MCLU, for a temporary restraining order restraining Donald Kowalski, Guardian, from prohibiting, inhibiting or otherwise interfering with visitation by Faegre & Benson and the MCLU with their client, Sharon Kowalski.

2. On Thursday, May 30, 1985, I visited Sharon Kowalski at the Park Point Manor Nursing Home in Duluth, Minnesota ("Park Point"). Also present during this visit were Edwin Lee, a legal intern with the MCLU, and Karen Thompson.

3. Ms. Thompson was present during the May 30 visit at my request solely for the purpose of assisting me in communicating with Sharon Kowalski.

4. During the May 30 visit, I communicated with Sharon Kowalski by orally asking her questions. Sharon Kowalski responded to my questions by typing answers on an electric typewriter.

5. During the May 30 visit, I asked Sharon Kowalski, among other questions, in substance the following questions and she typed the following answers:

Question: The MCLU is a private organization. Our purpose is to represent people when their constitutional rights have been violated. I'm the legal counsel of the MCLU and we work with volunteer attorneys who directly handle the cases. Do you understand what I have just explained to you?

Answer: Yes.

Question: Do you want me as a representative of the MCLU to visit you?

Answer: Yes.

Question: Do you understand that if the MCLU represents you, we can only represent you on the constitutional issues involved in your case such as your right to counsel and your right to receive visitors of your choice?

Answer: Yes.

Question: Do you feel that your wishes are being made known to the court?

Answer: No.

Question: Do you want your wishes to be made known to the court?

Answer: Yes.

Question: Will you tell me what your wishes are?

Answer: Yes.

Question: Do you want me to represent you to make your wishes known to the court?

Answer: Yes.

Question: Do you want me to visit you again with a volunteer attorney?

Answer: Yes.

6. On Wednesday, June 12, 1985, I again visited Sharon Kowalski at Park Point. Also present during this visit were Amy B. Bromberg, an attorney with the law firm of Faegre & Benson, Terri A. Brady, an associate with Faegre & Benson, and Ms. Thompson.

7. Ms. Thompson was present during the June 12 visit at my request solely for the purpose of assisting us in communicating with Sharon Kowalski.

8. During the June 12 visit, I communicated with Sharon Kowalski by orally asking her questions and she responded by typing answers on an electric typewriter.

9. During the June 12 visit, I introduced Ms. Bromberg to Sharon Kowalski as a volunteer attorney for the MCLU and

asked Sharon Kowalski if she wanted us to make her wishes known to the court. She responded by typing "Yes".

10. At the end of the June 12 visit, I asked Sharon Kowalski if she wanted us to visit her again and she typed "Yes".

11. Based upon the foregoing, it is my belief that Sharon Kowalski has retained Faegre & Benson and the MCLU to represent her in the above-captioned proceedings.

FURTHER AFFIANT SAYETH NOT.

JANLORI GOLDMAN

Subscribed and sworn to before
me this 5th day of August, 1985.
SUSAN E. SHAW-MEADOW
Notary Public—Minnesota
Hennepin County
My Comm. Exp. Jan. 22, 1991

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF SHERBURNE — PROBATE DIVISION
TENTH JUDICIAL DISTRICT

IN RE: GUARDIANSHIP OF
SHARON KOWALSKI, WARD

File No. 4497

AFFIDAVIT OF AMY B. BROMBERG

STATE OF MINNESOTA
COUNTY OF HENNEPIN—ss.

Amy B. Bromberg, being first duly sworn upon oath, deposes and says:

1. I am an attorney with the law firm of Faegre & Benson and have personal knowledge of the matters set forth in this

Affidavit. I am submitting this Affidavit in support of the Motion of Sharon Kowalski, Ward, and her attorneys, Faegre & Benson and the Minnesota Civil Liberties Union (the "MCLU"), for a temporary restraining order restraining Donald Kowalski, Guardian, from prohibiting, inhibiting or otherwise interfering with visitation by Faegre & Benson and the MCLU with their client, Sharon Kowalski.

2. No previous application has been made for the order requested by said Motion.

3. On Wednesday, June 12, 1985, I visited Sharon Kowalski at the Park Point Manor Nursing Home in Duluth, Minnesota ("Park Point"). Also present during this visit were Janlori Goldman, Legal Counsel and Assistant Director of the MCLU, Terri A. Brady, an associate with Faegre & Benson, and Karen Thompson.

4. Ms. Thompson was present during the June 12 visit solely for the purpose of assisting us in communicating with Sharon Kowalski.

5. During the June 12 visit, Ms. Goldman introduced me to Sharon Kowalski as a volunteer attorney for the MCLU. I communicated with Sharon Kowalski by orally asking her questions. Sharon Kowalski responded to my questions by typing answers on an electric typewriter.

6. During the June 12 visit, I asked Sharon Kowalski, among other questions, in substance the following questions and she typed the following answers:

Question: Do you understand that there is a court proceeding going on where decisions are being made about who you get to see and where you live?

Answer: Yes.

Question: Do you feel that your wishes are being made known to the court?

Answer: No.

Question: Do you want me to help you let the court know what you want?

Answer: Yes.

7. On Thursday, June 20, 1985, I caused a Notice of Appearance to be served and filed entering the appearance of Faegre & Benson as counsel on behalf of Sharon Kowalski, a true copy of which is attached hereto as Exhibit A.

8. On or about June 28, 1985, I received a copy of a letter dated June 25, 1985, from Jack Fena, Donald Kowalski's attorney, to the Honorable Bruce R. Douglas, which letter stated that Mr. Fena had received a copy of the notice of appearance referred to above and that he welcomed my entry into this case. A true copy of said letter is attached hereto as Exhibit B.

9. On Monday, June 24, 1985, I again visited Sharon Kowalski at Park Point. Also present during this visit was Ms. Brady.

10. When I first arrived at Park Point on June 24th and asked to visit with Sharon Kowalski, Ann Pellman, Head Nurse of the Young Adult Unit, advised me that I could only visit with Sharon Kowalski if Sharon Kowalski wanted to visit with me. I then observed as Ms. Pellman asked Sharon Kowalski to indicate either yes or no regarding whether or not she wished to visit with me by moving different fingers. Sharon Kowalski indicated by moving her finger that she wished to visit with me.

11. During the June 24 visit, I communicated with Sharon Kowalski by orally asking her questions. Sharon Kowalski responded to my questions by typing answers on an electric typewriter.

12. During the June 24 visit, I asked Sharon Kowalski, among other things, in substance the following questions and she typed the following answers:

Question: Do you remember me?

Answer: Yes.

Question: Do you still want me and the MCLU to help you in the court proceedings?

Answer: Yes.

13. Based upon the foregoing, it is my belief that Sharon Kowalski has retained the MCLU and Faegre & Benson to represent her in the above-captioned proceedings.

14. On Friday morning, July 26, 1985, I telephoned Joanne Susens of Park Point, identified myself and inquired as to whether or not I could visit Sharon Kowalski. Ms. Susens advised me that Donald Kowalski had given the nursing home a list of approved visitors and that I was not on the list. She further advised me that in order to visit Sharon Kowalski, I would have to get express permission from Donald Kowalski.

15. On Friday afternoon, July 26, 1985, I had a telephone conversation with Barbara Blumer, attorney for Park Point, during which she advised me that Sharon Kowalski had been discharged from Park Point and moved to another facility. Ms. Blumer further advised me that, pursuant to the instructions of Donald Kowalski, she was not permitted to tell me either the facility or city to which Sharon Kowalski had been moved.

16. I immediately telephoned Thomas D. Hayes, court-appointed attorney for Sharon Kowalski, and advised him of the substance of my telephone conversation with Barbara Blumer. Mr. Hayes responded by advising me that he did not know about Sharon Kowalski's discharge from Park Point and that he would attempt to contact Mr. Fena to determine where Sharon Kowalski had been moved and to discuss visitation with her.

17. Later that same day, Mr. Hayes telephoned me and advised me that he had talked with Mr. Fena and that Mr.

Fena had advised him that Sharon Kowalski had been moved to a nursing home in Hibbing, Minnesota. Mr. Hayes further advised me that Mr. Fena did not respond either affirmatively or negatively as to whether or not Mr. Hayes or I had permission to visit Sharon Kowalski, and that Mr. Fena stated to Mr. Hayes that he did not have a problem with my contacting Donald Kowalski directly for permission to visit Sharon Kowalski.

18. On July 27, 1985, I attempted to contact Donald Kowalski by telephone and left a message at his home with my name and telephone number, stating that the purpose of my call concerned my request for visitation with Sharon Kowalski.

19. On Monday, July 29, 1985, having received no response to the message I left for Donald Kowalski, I telephoned Mr. Fena and indicated that I wished to visit Sharon Kowalski.

20. Mr. Fena responded to my request by inquiring as to whether Faegre & Benson represented any of the insurance companies involved in the personal injury lawsuit Mr. Fena has brought, at the request of Donald Kowalski, on behalf of Sharon Kowalski. Mr. Fena asserted that if Faegre & Benson had ever in the past or presently was representing any of the insurance companies in any capacity, Faegre & Benson had a conflict of interest and could not represent Sharon Kowalski in the guardianship proceedings. Mr. Fena then demanded that I make my request for visitation in writing, stating the purpose of any such visit and whether or not any conflict of interest exists.

21. I immediately investigated the possibility of a conflict of interest on the part of Faegre & Benson and discussed the matter with my partners. We determined that there was no such conflict and I therefore sent Mr. Fena the requested letter, via Federal Express, a true copy of which is attached hereto as Exhibit C.

22. On Wednesday, July 31, 1985, having received no response to my letter request for visitation, I telephoned Mr. Fena and inquired as to whether or not I would be permitted to visit my client, Sharon Kowalski.

23. Mr. Fena responded that Faegre & Benson had a conflict of interest, that I was denied permission to visit Sharon Kowalski until I proved that no such conflict exists, and further, that he did not believe that Faegre & Benson or the MCLU represented Sharon Kowalski. Mr. Fena further advised me that he would be at the Holiday Inn, Nicollet Mall, Minneapolis, Minnesota on August 1, 1985 and thereafter in Alaska until August 19, 1985.

24. I advised Mr. Fena that we could not wait until August 19 to visit our client, Sharon Kowalski, and that if we did not have permission to visit her, we would move the Court for a temporary restraining order as soon as possible.

25. On Thursday, August 1, 1985, I attempted unsuccessfully to reach Mr. Fena by telephone at the Holiday Inn in Minneapolis to advise him of the date of the hearing on the temporary restraining order and left a message requesting that he return my call. Mr. Fena did not return my telephone call.

26. Upon information and belief, Sharon Kowalski is residing at Leisure Hills Nursing Home in Hibbing, Minnesota ("Leisure Hills").

27. Upon information and belief, when any individual telephones Leisure Hills and inquires as to the possibility of visiting Sharon Kowalski, Leisure Hills responds by advising such individuals that they must telephone the Guardian Donald Kowalski for permission to visit Sharon Kowalski and that Donald Kowalski's telephone number can be obtained from the telephone directory.

28. Upon information and belief, Donald Kowalski has disconnected his listed telephone number and now has an unlisted telephone number.

Further affiant sayeth not.

AMY B. BROMBERG

Subscribed and sworn to before me
this 4th day of August, 1985.

LORI J. TIMM
Notary Public

EXHIBIT A

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF SHERBURNE — PROBATE DIVISION
TENTH JUDICIAL DISTRICT

Court File No. 4497

IN RE: GUARDIANSHIP OF
SHARON KOWALSKI

NOTICE OF APPEARANCE

To: Donald and Della Kowalski and their attorney Jack Fena, 311 East Howard Street, P.O. Box 667, Hibbing, Minnesota, 55746; Karen Thompson and her attorney Elizabeth Ristvedt, 916 St. Germain, P.O. Box 971, St. Cloud, Minnesota, 56302; Thomas Hayes, Smith, Pringle & Hayes, P.O. Box 668, 207 South Walnut Street, Monticello, Minnesota, 55362.

PLEASE TAKE NOTICE that Brian B. O'Neill and Amy B. Bromberg, Faegre & Benson, 2300 Multifoods Tower, 33

South Sixth Street, Minneapolis, Minnesota 55402 hereby enter their appearance as counsel on behalf of Sharon Kowalski.
DATED: June 20, 1985.

AMY B. BROMBERG
Brian B. O'Neill
Attorney Reg. No. 82521
Amy Bromberg
Attorney Reg. No. 145336
Volunteer Attorneys
Minnesota Civil Liberties Union
2300 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402-3694
(612) 371-5300
Attorneys for Sharon Kowalski

AFFIDAVIT OF SERVICE BY MAIL

Re: Guardianship of Sharon Kowalski
File No. 4497

STATE OF MINNESOTA
COUNTY OF HENNEPIN—ss.

Adria D. M. Finnegan of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 20th day of June, 1985, she served the annexed:
NOTICE OF APPEARANCE
in the referenced file on the following attorney(s) by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Minneapolis, Minnesota directed to said attorney(s) at the following address(es):

Jack Fena, Esq.
311 East Howard Street
P.O. Box 667
Hibbing, MN 55746
Thomas Hayes, Esq.
Smith, Pringle & Hayes
P.O. Box 668
207 So. Walnut St.
Monticello, MN 55362
Elizabeth Ristvedt, Esq.
916 St. Germain
P.O. Box 971
St. Cloud, MN 56302

ADRIA D. M. FINNEGAN

Subscribed and sworn to before
me this 20th day of June, 1985.
JERRI LOU HOLMGREN
Notary Public—Minnesota
Hennepin County
My Commission Expires May 8, 1986

EXHIBIT B

Law Offices of
JACK FENA
311 East Howard St., P.O. Box 667
Hibbing, Minnesota 55746

Telephone—
Office 218 - 263-3623
Home 218 - 254-2505

June 25, 1985

Honorable Bruce Douglas
District Court Judge
Sherburne County Courthouse
Elk River, MN 55330

Re: Sharon Kowalski
Court File No. 4497

Dear Judge Douglas:

I am forwarding to the Court copy of Park Point Manor's letter of June 18, 1985, received by Donald Kowalski. As the Court knows, Mr. Kowalski has been banking the Social Security monies received since their inception. He spent various and sundry amounts and the Court has before it his itemized accounting and I am referring to the television set, etc.

On February 15, 1985, when we appeared at your Court at Elk River at the hearing on that date, the Court indicated to all of the parties that the Court would make an order granting some reimbursement out of the funds that are referred to. The Court has yet to make that award and I am wondering if the Court could please make the award as the Court indicated it would so that Mr. Kowalski can get some reimbursement. As I have stated to the Court, he has spent literally thousands and thousands of dollars of his own money and in fact has practically devastated his life savings in doing the

things he is required to do in looking after his daughter's interests.

Another thing I want to bring up is the matter of home visitation; as you might recall pursuant to our telephone conversation you had indicated that you would issue an order for home visitation with the family, as well as an order for the parents to take Sharon out of the Duluth area to Della Kowalski's brother's home in Two Harbors, which is approximately 25 miles north of Duluth.

The Court can see in the photo album what these visits to her uncle's home and her parents' home have done for her and her spirits.

I am again taking the liberty of enclosing a proposed order that would allow Sharon some visitation at home since she has been in the nursing home since Easter.

I also wish to state to the Court that I received a copy of notice of appearance by Amy Bromberg and Brian B. O'Neill, attorneys representing the Minnesota Civil Liberties Union. I did have a conversation after receiving this notice with Ms. Bromberg and told her I welcomed her entry into this case, even though all of the evidence has been submitted and final arguments made to the Court.

At any rate, it is the hope of these parents that the Court will issue its order relative to visitation. They are, after all, her parents.

I wish to thank you for giving this matter your consideration and I remain,

Respectfully yours,
JACK FENA
Attorney at Law

JF/sb
Enclosure
cc: Elizabeth Ristvedt, Esq.
Thomas Hayes, Esq.
Amy Bromberg, Esq.
Mr. Donald Kowalski

EXHIBIT C

July 29, 1985

FEDERAL EXPRESS

Jack Fena, Esq.
311 East Howard Street
P.O. Box 667
Hibbing, MN 55746

Re: In re: The Guardianship of Sharon Kowalski
File No. 4497

Dear Mr. Fena:

Pursuant to your request during our telephone conversation earlier today, this letter sets forth in writing our request to the Guardian of Sharon Kowalski for permission to visit Sharon. As I have advised you in the past, Sharon has retained the Minnesota Civil Liberties Union to represent her in the above-captioned action. Our firm is acting as volunteer attorneys for the Minnesota Civil Liberties Union in this action and we wish to visit with our client for the purpose of obtaining her instructions. As you requested, I have looked

into the possibility of a conflict of interest regarding State Farm Insurance and Ideal Mutual Insurance and am happy to inform you that no such conflict exists.

I spoke with Tom Hayes earlier today and he also wishes to visit Sharon. He advised me that the purpose of his visit is to measure Sharon's adaptation to her new environment. Mr. Hayes and I will most probably visit Sharon at the same time.

We would like to visit Sharon as soon as possible and would thus appreciate a reply to our request at the Guardian's earliest convenience.

Very truly yours,
AMY B. BROMBERG

ABB/ak
cc: Thomas D. Hayes, Esq. (via Federal Express)
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In The
Supreme Court of the United States
October Term, 1985

IN RE GUARDIANSHIP OF
SHARON KOWALSKI, WARD

On Petition for Writ of Certiorari
to the Minnesota Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

A. STATEMENT OF THE CASE

Sharon Kowalski, then age 27 years, was severely and permanently injured on November 13, 1983, in an automobile accident when struck by a negligent driver. As a result of the accident Sharon Kowalski is paralyzed and has severe brain injuries and is totally incapacitated, both physically and mentally. (App. 1-7).

Since her injury extensive litigation has taken place surrounding the terms of her guardianship.

On April 25, 1984, the District Court, Probate Division (the Honorable Bruce Douglas) found Sharon to be an incapacitated person and appointed Donald Kowalski. Sharon's father, to be Sharon's guardian. Karen Thompson, who claims to be Sharon's lesbian lover, fought for and was given equal access to visitation with Sharon Kowalski.

Subsequent to that order, Ms. Thompson began a media blitz and disregarded Sharon's well being for her own personal gain. She wrote letters to Sharon's parents claiming a gay relationship. (T339).* She fought to keep Sharon in a nursing home with an 87 year old roommate who chanted 24 hours a day in temperatures that soared to 94 degrees without air conditioning. She made numerous motions to prevent Sharon from receiving optimal care. She consistently and intentionally bombarded Sharon with negative messages about her parents, about being in a dangerous place, about getting good care, about her parents keeping her prisoner and various messages of that

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* Transcript from Trial Court will be referred to as T —.

sort. (T178). Because of these activities a new trial was held on May 3, 1985 and May 9, 1985.

On July 22, 1985 a new order was created giving Donald Kowalski all of the powers of a guardian and stripped Ms. Thompson of her powers. The order further contemplated complete denial of visitation by Ms. Thompson when it ordered Donald Kowalski to " . . . consider regarding visitation, the recommendation of medical and health care personnel and the needs and desires of the institution wherein the ward resides."

Following the July 22, 1985 order Donald Kowalski, as ordered by the court, followed the advice of four (4) separate medical doctors, all of whom had been Sharon's attending physicians, and terminated contact between Ms. Thompson and his daughter. (App. 8-19).

The Minnesota Civil Liberties Union then filed an appeal on behalf of Sharon Kowalski, claiming to be her representative. Thomas Hayes, the court-appointed representative, also filed an appeal, as did Ms. Thompson. Thomas Hayes also associated the MCLU with him without obtaining the permission of the trial court.

Donald Kowalski moved the Minnesota Court of Appeals to have the MCLU removed as attorneys for Sharon Kowalski and to deny their appeal as they had no standing to represent Sharon. The Minnesota Court of Appeals removed the appeal by the MCLU and also would not allow the MCLU to associate with the court-appointed attorney without order of the trial court. The Minnesota Court of Appeals did grant the MCLU amicus curiae status and allowed them to submit a brief, which they have done.

The MCLU then appealed that decision to the Minnesota Supreme Court and that appeal was dismissed. The MCLU then petitioned the Minnesota Supreme Court for a rehearing and that petition was denied.

The MCLU has throughout this action taken the side of both Karen Thompson and the court-appointed attorney, Thomas Hayes. They have nothing new to add.

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B. DISCUSSION

Sharon Kowalski Is Incapacitated And Lacks The Ability To Hire An Attorney Of Her Own Choice.

In his order of July 23, 1985, the Honorable Bruce Douglas made findings of fact regarding the mental status of Sharon Kowalski. He found in part that:

"2. The ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her person.

4. The ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her estate or financial decisions.

5. The ward has demonstrated behavioral deficits evidencing inability to manage her estate.

8. The ward is incapable of exercising the following rights and powers:

c. (2nd letter "c") to consent to necessary medical or other professional care, counselling, treatment or service.

12. The ward's ability to respond or communicate has been inconsistent and, at times, unreliable, which situation may or may not improve."

The findings of the trial court are clear that Sharon Kowalski is unable to hire an attorney. Even a response that she requests "help", the basis for the Minnesota Civil Liberties Union intervention in this matter, doesn't give a basis for the Minnesota Civil Liberties Union saying that they have been hired by Sharon. Any incapacitated person desires help, but she is incapable of understanding what type of help the Minnesota Civil Liberties Union can and will give. Dr. Cowan points this out in his August 27, 1985, affidavit (App. 20-24) in which he, Sharon's attending psychiatrist, states that:

> "14. It is my opinion based upon the history, the rehabilitation conference report dated October 9, 1984, conversations with her medical and nursing home personnel, perusal of medical and nursing home records, conferences with her attending physicians, and my own examination of Sharon Kowalski, that she would be unable to understand the questions and use the complex reasoning that would be required to give intelligent answers;
>
> 15. The whole, entire history shows that Sharon's brain damage causes her to be totally confused in answering questions. It is my opinion and belief that Sharon does not have sufficient understanding to make reasoned, intelligent answers to the questions as shown in these affidavits."

Important to note is that the MCLU solicited Sharon Kowalski. They went directly to her attempting to get hired. They went directly to a brain-injured individual who they knew lacked the ability to make decisions, probably at the urging of Ms. Karen Thompson, whom they have sided with all along.

Sharon Kowalski already has a court-appointed attorney who has been actively involved and who brought an appeal. He is advocating exactly what the MCLU is advocating. He filed an appeal of the July 23, 1985 order and the MCLU was granted amicus curiae status for that appeal. Any appeal brought by the MCLU is superfluous and unnecessary and acts only to dissipate the assets of an estate which has already been in court numerous times and continues to be forced to fight requests such as this.

How can an incapacitated ward with mental abilities of a six or seven year old, who gives inconsistent answers, hire an attorney? The answer is simple; she cannot. She doesn't understand what is being asked of her. Karen Thompson has admitted on the stand that she has personally experienced inconsistencies. (T349). The record is replete with inconsistencies, including wrong answers to simple questions such as her age and where she was presently residing. The physicians all point to inconsistencies (App. 8-19) and the court found such inconsistencies in its July 22, 1985 order.

It is clear that the MCLU is not neutral in this matter as they claimed they would be. They smell an issue and seem only to care about the issue. Why do they constantly fight the guardian despite the presence of medical reports contrary to their position.

Counsel's argument that Minn. Stat. § 525.56, Subd. 3(5) gives Sharon the power to approve "contracts for necessity" must be seen in light of the common law history of this concept. Common law gave incapacitated persons the power to contract for necessities to protect people such as merchants and others who contract with persons

who don't know of an incapacity. *Kay v. Kay,* 53 Ariz. 336, 89 P.2d 496, 120 N.E.2d 7; *Granes v. Norris,* 3 Ill.2d 112, 120 N.E.2d 7; *Talbert v. Ellzey,* 203 Miss. 612, 35 So.2d 628. This is not such a case. This matter is a case where the ward must be protected from the MCLU who comes directly to her, knowing of her incapacity, and gets her to respond on her machine that she wants help. This is clearly not what the statute anticipated. The court appointed the firm of Smith, Pringle & Hayes because the court knew and saw that Sharon was incapable of approving any contract. The court dealt with attorneys when they found that Sharon was incapable of consenting to ". . . other professional care . . ."

The appellants' use of criminal law cases to support their view is erroneous. This case is in no way similar to those cases where the parties have the mental capacity to make a determination. Where a party is unable to make that determination, it should not be the MCLU's right to make a determination that they have been hired. To protect the ward, the decision must be left in the hands of the court, not any attorney who comes around looking for work or smelling an issue.

———o———

CONCLUSION

For these reasons, a Writ of Certiorari should be denied.

Respectfully submitted,

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Ward

App. 1

INITIAL EVALUATION 10-9-84

REHABILITATION CONFERENCE

MILLER-DWAN HOSPITAL AND MEDICAL CENTER
and
NAT G. POLINSKY MEMORIAL
REHABILITATION CENTER

Rehabilitation Conference
Form MH-41

KOWALSKI, Sharon

MR # 10-48-52

R 305-1

Dr. S. K. Goff

date: 10/9/84

INITIAL EVALUATION

This is a 28-year-old woman who was admitted to the Rehabilitation Unit on 9/14/84 for a rehabilitation evaluation. She was involved in a motor vehicle accident Nov. 13, 1983. She sustained a severe closed head injury. Her emergency care was at St. Cloud Hospital. According to the reports, a CT scan at that time demonstrated a right temporal contusion, multiple areas consist with scattered cerebral hemorrhages. She was breathing spontaneously and demonstrated fixed flexion posturing of right side. Also had other injuries, including a fractured femur which required open reduction, subsequent fever spikes and wound infection problems following this. Subsequently seizure activity was demonstrated by EEG and she was placed on Dilantin therapy. She was hospitalized at St. Cloud from Nov. until July of 1984, then was transferred to the Country Manor Nursing Home in Sartell, Mn fol-

lowing this. According to the accompanied medical notes, her progress was extremely slow. Because of the severity of her injury and her slow progress, it was felt by her attending physicians that she would not benefit from an intensive rehab course at that time. She did have a rehab review by Dr. Keith Sperling sometime during her stay, a physiatrist from the University of MN. His report was not available. He did suggest that she be placed on Didronel to prevent heterotopic ossification. She did receive daily physical therapy at the Country Manor Nursing Home and occupational therapy, apparently some intermittent speech therapy, though the frequencies of these are unknown at this time. She was on medications at the time of her transfer, in the form of Dilantin 200 mg. b.i.d.; Symmetr 100 mg. b.i.d.; and was on tube feedings. She was allergic to Penicillin. Past medical history was unremarkable. Medical course during this stay has been unremarkable. She was seen in neurologic consultation and head to the right, both arms in flexion posturing, and spontaneous movements of the right hand were noted with marked proximal apasticity. Reflexes were hyperreflexic, bilateral plants extensor responses were noted in the lower extremities. Her yes/no responses seemed unreliable. Right Abducens palsy was demonstrated and some vertical nystagmus with antisocoric pupils. Markedly spasticity of her palate movements and increased gag reflex were noted. Dr. Holt suggested checking the CT scan to document the severity of posterior fossa injury, in addition to the cerebral injury, and rechecking an EEG. With the severity of the bulbar findings, a gastroscopy was recommended. If not done, a trial of Lioresal or Dantrium could be undertaken. CT scan did show some asymmetry be-

tween the size of the lateral ventricles, the right being more prominent than the left. Posterior fossa was unremarkable.

REVIEW OF HER REHAB PROBLEMS:

1) *Home situation*—The patient is single and was born in Grand Rapids. Grew up in the Nashwauk area. Has a 26-year-old sister in Hibbing; a 24-year-old brother in St. Peter. Both living maternal grandparents; 1 living paternal grandparent. Prior to her injury, the patient was living in St. Cloud. Her parents live in Nashwauk. Father is retired from Hanna Mining, but does do some self-employed work at this time in landscaping. Her mother is a homemaker. Patient did complete a high school education. She went to college in Bemidji, Hibbing Junior College, and graduated from St. Cloud as a physical education instructor. She had been layed off, however since the spring of 1983 and had reportedly been discouraged prior to her accident about lack of employment. She is generally interested in physical activity, sports of all kinds, outdoor activities. Prior to her accident, she lived in the home of Karen Thompson in St. Cloud. At this time, ultimate home disposition planning has not been decided. Currently the matter regarding disposition and guardianship is in the hands of the District Court in St. Cloud. Guardianship is currently being held by the father. As we understand, the matter is going to be settled in the Court in mid October. Disposition planning, thus, will have to wait until this decision is made. If parents are granted guardianship, parents would prefer Sharon to remain within reasonable commuting distance of their home, and ultimately if home care is possible, they would like to pursue this possibility.

If she goes back to St. Cloud, she would most likely be back initially to the St. Cloud Nursing Home. If Karen Thompson is granted guardianship, she would eventually like to care for Sharon in her home. Currently the patient's medical care is being supported by Minnesota Medical Assistance. Her application for Social Security has been made and litigation is also pending. Also investigation into a supplemental insurance policy.

2) *Communication and cognitive dysfunction*—The patient was evaluated in detail by both the psychologist and the speech therapist. The following is a summary of their findings. Because of the limited cognitive capabilities of this patient, the testing was informal. In many tests only portions of the tests could be applied. Portions of the Minnesota test for the different diagnosis of aphasia; the Wigg-Semel test of linguistic concepts, the Peabody Picture Vocabulary test; the Peabody Individual Achievement test were administered. Auditory comprehension felt to be severely impaired, meaning that her responses were inconsistent and spotty. She had limited expressive abilities which also limited evaluation of auditory comprehension. The patient was tested with yes/no responses by head nods, scanning, position to pointing using the fingers of the right hand, positioned statements using finger movements, following directions and scanned by the examiner. In scanning the examiner goes over a series of response choices, responding by pointing to each item hoping to elicit a response from the patient. The examiner felt that responses to all modes of communication were inconsistent. The results tended to be different with the same question getting different responses. It was noted that there was no consistency between which modes

seemed to work the best. Variation was not related to temporal relationship or the patient's condition. Therapist felt that the scanning modalities and the position pointing responses were most successful. The most ineffective and unreliable response mode was the finger response to a conditioned question or statement. Patient's ability to follow direction was tested in detail. She was presented with body commands, as "raise your hand". With repeat efforts, she responded accurately to only one command out of seven. When the commands, however were repeated and gestures were added, she could respond in an improved manner, and in this case respond to three more of the commands (out of seven). Plus it was felt that she inconsistently comprehended commands. It was apparent that gesturing enhanced understanding. The therapist felt that repetition of a command did not necessarily increase the ability to comprehend. Her ability to understand words, sentence and paragraphs was also tested. Comprehension of common words using the scanning response system was 100% accurate. This was the only consistent performance noted by the therapist during her entire examination. Pointing responses were generally ineffective. She was definitely correct only 50% of the time. Part of this limitation may have been her spasticity and postural limitations. The Peabody Picture Vocabulary test where the patient selected one of four pictures responding to a presented word with the scanning response mode produced variable responses. Initially responded to 13 of 14 items. Then was inconsistent in her responses following that. The Minnesota test, looking at sentence level understanding, demonstrated variability, using all modes of responsiveness. She responded to 12 of 15 general yes/

no questions with head nods. This was not the standard and usually she did not do this well. Part of this was due to the difficulty detecting definitive head nod. The therapist felt therefore that this was an ineffective measure of comprehension. Using the scanning system she was felt to be at essentially a chance level in her responses. Given a descriptive statement regarding a single picture, she was 80% accurate in responding by moving the corresponding finger. On the Minnesota test, she was unable to accurately answer yes/no questions of paragraph length material. No response was felt to be effective. Therefore, the conclusion was that she could comprehend inconsistently at a common word level and sentence level; unable to comprehend paragraph length material. Her ability to comprehend conditional statements was also tested. These consisted of rather concrete personal questions, such as, "If your hair is red, move your finger", and higher levels of information, such as, "If lunch comes before breakfast, move your finger". It is felt by the examiner that these conditional statements were beyond the patient's ability as to understand, and this included both the concrete personal areas and higher level areas. The Reading ability was also tested and indicated a severe impairment. The Minnesota test showed the recognition of words was 87% accurate with position pointing system, 75% accurate with a scanning system. The level of comprehension was also assessed. Responses to general yes/no questions were variable. Head nod responses were at the chance level. In the Peabody Individual Achievement test, no basal score could be obtained. This required the patient to read a sentence and select one possible picture of four which corresponded to the sentence. The examiner felt in sum-

mary that the patient was able to inconsistently read and comprehend at the single word level. Expressive communication was evaluated and felt to be severely to profoundly impaired. During the evaluation sessions, speech was observed. Spontaneous verbalizations were noted and that did not appear to be purposeful or reactive. No voicing to command was noted. She was observed on a videotape to be imitating vowels. It was noted that she may have done a bit of humming during her physical therapy sessions. The therapist felt also that yes/no responses observed through head nods as a response mode were not reliable. Pointing responses were functionally poor for physical reasons with her accuracy often depending on where the response was located on the page before her. Many of her responses were noted to be left to the interpretation or assumptions by the observer. It was felt that the one finger—yes, two fingers—no, modality was not functional or was felt that scanning is a system that the patient could use, although the consistency of her responses was adversely affected by her decreased comprehension. A number of non-vocal systems were tried using alphabet boards, mechanic communicator and others. Physical limitations complicated use of these devices. For example, she was able to find the "S" on the alphabet board to spell her name, but could not find the second letter. Her writing skills demonstate a severe to profound impairment. She could write her first and last name with partial and variable legibility. Could not write letters to dictation legibly, and all attempts to write common words to dictation were not legible. Did not respond when asked to write numbers. Oral motor function was evaluated. Trace movement of her lips were noted. Chewing-type

movements were spontaneously noted of the jaw. The tongue could be brought to the lips. Spontaneous voicing was occasionally heard, but not on command during sessions. She had a hyperactive gag reflex and could not swallow on command. Because of these difficulties, a barium swallow was subsequently recommended. The overall summary of the speech function is that she does demonstrate scattered emerging abilities in all areas tested. The patient was also seen by the psychologist for recognitive evaluation over a period of several days to try to evaluate consistency. She was administered several formal psychometric tests and a variety of informal test materials. As to her difficulty in responding consistently, she was unable to complete any of this formal testing. Testing tried by the psychologist included the color form preference subtest, the recognitive diagnostic battery, a test of non-verbal intelligency, collected items from the Stanford-Binne-Intelligence Scale. On the color form preference subtest, in which patient shows preference for color indicates a level of responding, which is less mature developmentally than individual responding to form stimuli. Based on this subtest, her cognitive functioning ability would be below a 6 or 7 year age level. With tests of non-verbal intelligence and a language free test of non-verbal intelligence, she was only able to obtain three correct responses of six on the pratical ones. A full-scale test was not administered because of performance on the initial items. A full-scale test was not administered because of performance on the initial practice item. Multiple items from the Standford-Binne' were administered, including identifying objects, body parts and including a delayed response for items at year level two. She was able to identfy body parts

and was able to accurately locate some objects. Some of the responses were difficult to interpret for reasons indicated in the speech evaluation. She was able to correctly identify however, on the delayed response which box a small object was hidden under. Test results and observations indicate cognitive function to be severely impaired. Her attention processes were felt to be good. She could make appropriate eye contact with testing material. Performance on the delayed response test does suggest that her ability to concentrate without distraction is a relative strength. Memory abilities are difficult to assess with this degree of impairment. They do seem to be relatively intact for simple identification of objects. This would indicate that her memory storage of verbally acquired information is present for some items, but the extent of her memory is not known, but is likely to be greatly diminished compared to premorbid levels. Her information processing in general was inconsistent, though she demonstrated appropriate responding, slow responding and occasionally no responding to test material. This was made difficult again for reasons stated in the speech evaluation, but it also reflects a slow information processing speed. She did not demonstrate any behaviors which would indicate any initiative on her part. She did demonstrate simple reasoning skills and ability to respond to commands. She did show a tendency to perseverate, indicative of a low developmental level of cognition. Her learning ability is likely to best consist of a repetitive stimulation and shaping of her responses. Much of her expressive repertoire at this time seemed to reflect overlearned responses to some degree, as demonstrated by her ability to point her finger. The examiner felt that the test results and inter-

pretations reflect an estimate of her current cognitive skill, compounded by her limited output modalities. It is felt by the psychologist that at a functional level, she was in a severe range of impairment. He felt, however, that her actual cognitive function at times may be higher, which would be consistent to a head injury, when at times islands of increased function appear. It is likely that her judgment or ability to make decisions for herself would be severely impaired, significantly due to her difficulty establishing a reliable means of communication. It is very easy to lead her responses, misinterpretate her gestures. This supports the opinion of the psychologist that she is not able to make judgments and decisions on her own.

3) *Upper extremity paresis*--This shows motor spasticity and flexor tone bilaterally, particularly proximally with significant fluctuation of this tone. Her activement movement is restricted to distal function on the right from the elbow to the fingers. No significant subluxetion of the shoulder was noted. Passive range of motion is from 0-90 degrees for shoulder abduction, 0-110 degrees of flexion of the shoulder. The remainder of her movements in her upper extremities can be stretched to within normal limits on the left, except for a neutral position of her wrist. On the right, there is 65 degrees of shoulder abduction, 40 degrees of shoulder flexion, ¾ range of forearm supination. Motion is resisted more on the right. Relaxation does encourage increased range of motion and a greater range of motion can be obtained supine rather than sitting. No carry-over of relaxation was noted. Motor skill could not be effectively formally evaluated, however she did demonstrate full active elbow flexion/extension, wrist flexion, finger flexion/extension, and ¾ active wrist exten-

sion. Grip strength on the right was measured at 15 lbs. Lateral pinch 6.5 lbs., and 2-point pinch 2 lbs.; all below the 10th percentile for her age. In the left upper extremity, only slight positional movements of the 5th fingers were noted but were nonfunctional. Functional use could not be formally evaluated. She could do a gross grasp and release with items as small as a paper clip. She had difficulty placing any objects because of her proximal dysfunction. She was able to actively flex her elbow in a functional manner, such as lifting her arm off a table. She did demonstrate the ability to use a dowel to point to objects and was able to wipe her mouth, but it was inconsistent. She was occasionally spontaneously noted to scratch her head or rub her nose. She can hold a pen in a functional writing position once it is placed. All movements were noted to be very slow. Sensation could not be adequately evaluated in her upper extremities. There was no evidence at least of severe tactile impairment.

4) *Visual dysfunction*—She does wear glasses, but apparently does not have a current prescription due to the accident. She can visually track in all directions. Loses track of objects at about 45 degrees to the right and the left. Her head is in the midline. Good tracking upward is noted, but not downward. As previously noted, she does have a right Abducens palsy and nystagmus, resulting in disconjugate eye movements. Formal visual testing would not be possible with this level of cooperation.

5) *ADL's*—Patient is completely dependent in her ADL's at this point. She can comb the front of her hair and bring her toothbrush to her mouth, but is not functional enough to carry through with these activities. Sig-

nificant verbal cuing is needed. The bladder is handled by diapers. Attempts have been made to evaluate her ability to void on regular intervals, but this has not been successful as of yet.

6) *Swallowing*—See the speech evaluation above for evaluation of oral-motor function. In addition, she did have a barium swallow. When the bolus was placed in her oral cavity, it was noted that there was no attempt to make the opaque into a bolus in preparation to initiate the swallowing reflex. Swallowing did not follow. When the swallowing reflexes was initiated, the barium did move readily through the pharynx and the hypopharynx and showed nomal esophagus motility. On occasion, however, the barium would leave the oral cavity as she extended her neck, and it would rest in the valleculsae without initiation of the swallowing reflex. On occasion during the swallow, the patient did aspirate the barium into the larynx and proximal trachea. Conclusion of this swallow was that it confirmed marked neuromotor discoordination, inappropriate initiation of the swallowing reflex, poor bolus formation and demonstrated a significant threat of aspiration. These findings would go along with the history that the patient has occasionally swallowed.

7) *Lower extremity disfunction*—formal testing is not possible and range of motion varied according to relaxation techniques at the time. On the right, her hip flexion was 95 degrees, and extension lacked 5 degrees. Knee flexion and planter flexion were normal. Abduction was limited on the right to 25-30 degrees. It was noted that the patient could actively abduct her knees. On the left, she was generally tighter. Extension lacked 30-40 degrees, abduction was approximately 10-15 degrees, dorsiflexion

lacked 20-25 degrees. She does show active control of the right lower extremity against gravity with her hip flexion, knee flexion and hip extension and knee extension. Hip abduction and adduction were seen with gravity eliminated. Traces of movement were noted inconsistently in the left. Hypertonicity was not in both lower extremities, particularly on the left. Adductor tone was noted in all positions. This could be released with relaxation techniques. Minimal reciprocal movements were noted in the right lower extremity.

8) *Dysmobility*—Patient was unable to initiate rolling on the mat, but she can turn her head in the direction of the roll. No trunk rotation was seen with any activities. No active illegible extension was noted during the prone position. A lack of head control was noted when she was prone over the bolster. Increased arm tone was noted during that time. She had poor balance in the sitting position, sitting in a flexed posture. Much relaxation must be effected before her feet can be placed flat on the floor. Little trunk control and head control were noted during sitting. That which is seen when constant verbal commands are presented, thus she needs moderate to maximal assist of one to sit. At times, she is able to extend her right arm and grip the side of the mat, thus hold herself up for short periods of time. Transfers from wheelchair to mat require maximum assistance of two, with a pick up or a standing pivot transfer. She has not had enough active lower extremity activity or weight bearing abilities to make her a candidate for gait activities. The wheelchair posture with a highback chair was poor. She tended to sit with weight bearing on the left hip, the right hip retracted. The head was generally flexed and rotated. The

lower extremities tend to be strongly adducted and the right leg tends to be in the extended position.

9) *Spasticity*—Has been described in the extremity exams above. There is marked spasticity and variable tone in all 4 extremities. Tone is affected by timing, positioning. She has been on Symmetrel in the past. It is not known whether she had been on a trial of Lioresal or Dantrium. She has not had any surgical procedure for spasticity control.

10) *Behavior and adjustment*—During her therapy sessions, she has been somewhat variable, at times alert, and at times lethargic. Her attention span has been inconsistent, but as noted above, at times has been quite good. She has been noted at times to respond during the full ½-hour treatment session. Other times, there has been little response. There does not seem to be any pattern with this level of responsiveness, which is what one would expect secondary to the head injury. Her appearance is that of a tendency for her head to be held in a flexed, slumped posture, turning her head to command. No spontaneous communication behaviors were noted. There has been no belligerent behavior. It is difficult with her to ascribe her periods of "withdrawn behavior" to behavioral dysfunction, or simply to alterations of level of consciousness. During her periods of less alertness, she would automatically appear withdrawn. Therapists all felt that her level of cooperation or variable did not change significantly throughout her stay. The variability of her cooperation did not seem to be affected by who was present in the room.

11) *Assessment and recommendations*—Patient's overall level indicates a severe level of impairment, like

significant brainstem and cerebral dysfunction. She is now 11 months post-injury. Limited improvement, neurologically speaking, can be expected. The previous pattern of very slow improvement could well continue for an extended period of time. Although this is highly variable, most patients are described as improving cognitively for a period of one year after injury, whereas the motor improvements may well extend to 2 or 3 years. This does not preclude the possibility that some improvement may occur through behavioral means and training methods. It is felt that at this point the patient is incompetent to make decisions regarding her own welfare, and she is not able to make judgments or decisions on her own.

12) *Recommendations*—

1) At this time, feeding should be held. Aspiration has been demonstrated. There is a definite threat for silent aspiration of oral materials into her lung. For this reason, a feeding gastrostomy was performed. It was suggested that this be used and her feeding function could be re-evaluated at 3 month intervals. If the threat for aspiration decreased, her oral feeding could be accomplished at that time. It would be permissible for small amounts of fluids in her mouth, and such things as lemon-flavored oral swabs.

2) Spasticity is a significant problem at this point. Continued observations on the part of the therapists as to which positions facilitate relaxation should be continued and this reported to the nursing staff. If she has not had a trial of Lioresal, this would be recommended to see if it would functionally improve her posture, her ability to use her right arm, and her head control. At this point, we would not consider her a candidate for more definitive spasticity treatments, that is neu-

rosurgical or orthopedic procedures, because of her poor level of motor function and her decreased level of cognitive function.

3) She should have a special wheelchair. There are several avenues that may be explored, one would be purchase of a stock wheelchair with a variety of bolster attachments, foot boards, lap boards to accomplish good positioning. She would require a high-back system, good head support, shoulder support system, a knee separator to prevent excess abduction. She will require experimentation of hip and knee position to facilitate relaxation.

4) It is felt that because of her severe impairment and slow rate of recovery, and limitations of potential, prolonged in-patient rehabilitation in a hospital unit would not be indicated at this time. It is recommended, however, that she does continue in an on-going rehab program. Components of this program should include daily physical therapy, daily occupational therapy, and daily speech therapy for a period of time such that progress can be closely monitored and evaluated. Also a psychologists contribution to cognitive re-training and monitoring would be desirable. Specific recommendation of individual therapists could be obtained by perusing their reports. It was felt important by the therapists that this close follow-up be indicated, because of the difficulty of assessing the accuracy of this patient's responses. For this reason, any program using persons other than therapists would need to be monitored and directed because of the potential problem of presenting materials that were inappropriate or too advanced for this patient. At this point, the ultimate disposition of this patient is uncertain for reasons stated in the report. It is felt that eventually she could be cared for in a home situation. However, it was felt in her best interest

that this would not be appropriate at this time for the above stated reasons. If the patient were to remain in the Duluth area, the most appropriate program could be obtained at Park Point Manor Nursing Home. This facility has a skilled rehabilitation section, specifically used for the young physically handicapped adult. To my knowledge, there are only 3 of those units currently in the State of MN. The residence does offer the comprehensive approach recommended. Approximately ⅓ to ½ of their patients were head injured patients and would provide a milieu of similarly injured patients undergoing similar therapies and in a similar age group. This would give the opportunity for medical follow-up, which should occur as well. Were she to remain in this area, we would see her at approximately monthly intervals. If she were to remain in another area, this responsibility would then be assumed by a physician in that area.

S. K. GOFF, M.D.

SKG/slh
D&T: 10/9/84

218-727-7451

Cowan Psychiatric Associates, Ltd.

330 Medical Arts Building
Duluth, Minnesota 55802

October 15, 1984

Jack Fena
Attorney at Law
P.O. Box 667
Hibbing, Minnesota

Re: Sharon Kowalski

Dear Mr. Fena:

Please be advised that at your request I interviewed Sharon Kowalski at Miller Dwan Hospital on October 4, 1984. Prior to my examination, I reviewed the chart.

Sharon was lying quietly in bed, appearing to be completely helpess. When I came into her room, the nurse was putting on her night clothes.

I attempted to interview Sharon but she was unable to speak. I was informed that she could answer questions by blinking once for a yes answer and two for a no answer. I proceeded therefore to determine if she was well oriented etc but when she did respond her answers were inconsistent. At one time she would blink once and when the same question was repeated she would blink twice.

Apparently Ms. Kowalski will require a fairly prolonged period of nursing home care along with some intensive physiotherapy and possibly psychotherapy if her condition improves to the point where she is amenable to such therapy. However at this point and in the immediate future she will require a great deal of tender loving care and parental love which is unconditional.

Sincerely,

/s/ George M. Cowan, M.D.

GMC/me

400 East Third
Duluth, MN 55805

THE DULUTH CLINIC, LTD.

December 20, 1984

Mr. Jack Fena
Attorney at Law
PO Box 667
311 East Howard Street
Hibbing, Minnesota 55746

RE: SHARON KOWALSKI
DC# 63 38 98

Dear Mr. Fena:

I saw Miss Sharon Kowalski at Park Point Manor on December 13, 1984 and spent some time with her, trying to assess how easy it is to communicate with her, how well she comprehends and if she is able to make significant decisions. I spent at least half an hour with Sharon. We were in a quiet, well lit room without any interference. She was sitting in a chair. She was alert and she was cooperative to the best of her ability.

She is severely impaired physically due to her closed head injury in 1983 and has only very limited ability to move her right hand and the fingers of her right hand. She is unable to speak or swallow. She is unable to move her other extremities. She has been given a small electronic computer printer which prints out messages on a strip of paper when she presses the letters with a pencil. This requires only light touch. She was able to spell the word cat. I asked her to spell her name, Sharon, but she only wrote SA. Using this little printer may turn out to be

very helpful; however at the present it is a very time consuming task for her and I did not try to get further information in this manner.

I presented her with a series of nonstructured statements or questions to which she could answer "yes" or "no" by moving her index finger or her thumb. I shall list these statements and questions and her replies separately.

It appears to me that there was quite a bit of inconsistency in her answers. She is apparently not aware of the fact that she is at Park Point Manor in Duluth, but thinks that she is at the Country Manor Nursing Home in St. Cloud. She does not understand the word "parents", which apparently is too abstract for her. It appears that she likes her mother, her father and Karen Thompson and enjoys their company. She thinks of Karen Thompson as a good friend.

I do not believe that Sharon Kowalski is able to make any significant decisions as to her future care. She had extensive psychological evaluation in October at Miller Dwan Hospital. At that time, it was felt that she was functioning mentally at a level below six or seven years of age and it is my opinion that she continues to function at this level. It is also my opinion that it is appropriate for her father as her parent to retain guardianship of his daughter.

I would expect that any improvement in her physical or mental condition will only be slight.

I do not believe that it would be appropriate for Sharon Kowalski to appear in court at this time because it would be too stressful and confusing an experience for her. I

believe it would be all right for her to visit her family at Christmas since they are able to take care of her physical needs on a short time basis at this time.

Yours truly,

/s/ J. C. Moller, M.D.

JCM:rhe

Enclosure

INTERVIEW WITH SHARON KOWALSKI 12/13/84
J. C. MOLLER, M.D.

This is Duluth	No*
The sun is shining	Yes
It is raining	No
It is snowing	No
This is Grand Rapids	No
This is Nashwauk	Yes*
This is Duluth	No*
Your sitting in a chair	Yes
Is this Minneapolis?	No
The sun is shining	No*
Do you like ice cream?	Yes
Do you like hamburgers?	Yes
Do you like to watch TV?	Yes
The sun is shining	Yes
Do you want to live with your parents?	No

*ANSWER IS INCONSISTENT

Do you want to stay in a Nursing Home?	No
Do you want to live by yourself?	Yes*
Do you want to live with your father?	Yes
Do you want to live with your mother?	Yes

(the patient apparently does not understand the meaning of the word "parents".)

Do you like Karen?	Yes
Do you want to live with Karen?	Yes
Does Karen live in Duluth?	No
Does Karen live in Minneapolis?	No

*ANSWER IS INCONSISTENT

INTERVIEW WITH SHARON KOWALSKI 12/13/54
J. C. MOLLER, M.D.

Does Karen live in Grand Rapid?	No
Did you know Karen when you were a little girl?	No
Have you known Karen for five years?	Yes
Have you known Karen for one year?	Yes
Have you known Karen for more than one year?	Yes
Did you teach Physical Education?	Yes
Do you think Christmas is coming soon?	Yes

Do you want to go home?	Yes
Would you like to live with your parents?	No*
Would you like to live with Karen?	Yes
Has Karen been good to you?	Yes
Do you like it here?	Yes
Do you like to read?	Yes
Can you swim?	No
Is this a nursing home?	No*
Is thus Duluth?	No*
Is this Chicago?	No
Is this Nashwauk?	No
Is this Grand Rapids?	No
Is this Superior?	No
Have you been at Miller Dwan Hospital?	No*
Have you been to Duluth?	Yes
Are we in Duluth?	No*

*ANSWER IS INCONSISTENT

INTERVIEW WITH SHARON KOWALSKI 12/13/54
J. C. MOLLER, M.D.

Are we in Grand Rapids?	No
Are we at Country Manor?	Yes*
Are we at Park Point Manor?	No*
Is it winter?	No*
Is it dark?	No

*ANSWER IS INCONSISTENT

Is it snowing?	No
Is this St. Cloud?	Yes*
Does your father live in St. Cloud?	No
Does your father live in Nashwauk?	Yes
Would you like to live with your father?	Yes
Would you like to live with your mother?	Yes
Would you like to live with Karen?	Yes
Do you want to live here?	Yes
Would you like to live in Minneapolis?	No
You are in Duluth, do you believe that?	No*
Would you like to go back to bed?	Yes
Do you hurt anyplace?	Yes
Does your head hurt?	Yes
Do you hurt anywhere else?	Yes
Do you hurt everywhere?	Yes
Does your toe hurt?	Yes
Does your hair hurt?	Yes

*ANSWER IS INCONSISTENT

THE DULUTH CLINIC, LTD.

400 East Third Street
Duluth, MN 55805

Mr. Jack Fena
Attorney at Law
PO Box 667
Hibbing, MN 55746

May 7th, 1985

Dear Mr. Fena,

I see Sharon Kowalski briefly once a month at Park Point Manor Nursing Home. On my visit May 6th, 1985 she was noncommunicative and appeared depressed. I conferred with the nurses who take care of her; they tell me that after Miss Karen Thompson's visits with the patient she seems more depressed and curls up in a fetal position. The nurses consider Miss Thompson's visits as abusive to a vulnerable adult.

In our local newspaper I have read that Miss Kowalski types sentence long messages to Miss Thompson on her small communicating machine; I seriously question her ability to do so spontaneously. I saw Miss Kowalski use this tool in December, 1984, and it was cumbersome for her to type out short single words; at that time she was unable to type out her own name.

In my opinion, Miss Kowalski remains unable to make any significant decisions and she is a highly vulnerable adult. In my opinion the the visits of Miss Karen Thompson are disruptive and harmful and therefore not in the best interest of the patient.

Yours Truly,

J. C. Moller, M.D.

THE DULUTH CLINIC, LTD.

400 East Third Street
Duluth, MN 55805
218/722-8364

May 8, 1985

TO WHOM IT MAY CONCERN

RE: SHARON KOWALSKI

DULUTH CLINIC# 63-38-98

The situation with Sharon Kowalski at Park Point Manor was reviewed by this examiner, with two other doctors involved with the case, Doctor Moller and Doctor George Cowan. I also have discussed the situation with one of the head nurses at Park Point Manor, and have asked for a psychological assessment by Jerry Henkel-Johnson, the psychologist at Park Point. Everybody did agree that Sharon become more depressed recently, and because of this, I did look towards the two psychologists and Doctor Cowan, the psychiatrist, for supporting recommendations as to the best way to handle this problem.

In discussing the situation with Doctor Cowan, he very specifically stated that he felt that the patient was suffering from a reactive depression, largely based upon her reactions to statements that she heard from Karen Thompson. He felt specifically that this was the case, and not that Sharon was depressed because of withdrawal from companionship or from withdrawal from the St. Cloud environment. Doctor Cowan reported that he had indeed documented negative response on the part of the patient to statements made specifically by Karen Thompson. We are both in agreement that the current cognitive status of Sharon does not allow for any sophisticated interpretation on her part of statements made to her by others. Thus, the suggestion by Karen Thompson that she was not in the

proper environment of an institution could potentially have very negative effects on her. This opinion was also echoed by her attending physician, Doctor Moller, who has been seeing her on a monthly basis at Park Point.

Thus, based on my own assessment and the recommendations of these two physicians, the staff at Park Point, I do concur with their recommendations that accessibility to Sharon on the part of Karen Thompson should be eliminated. It was Doctor Cowan's recommendation that there be no interaction between these two individuals at this time. Obviously, follow-up in this situation would be needed, both by the psychologists involved, the staff at Park Point, and Doctor Cowan.

Sincerely,

/s/ Steven K. Goff, M.D.
Physical Medicine and Rehabilitation

SKG/BJH

THE DULUTH CLINIC, LTD.

400 East Third Street
Duluth, MN 55805

J. Fena, Att.-at-Law
311 E. Howard Street
P.O. Box 667
Hibbing, Minn. 55746

July 25, 1985

Dear Mr. Fena: Re/ Sharon Kowalski

As of to-day, July 25th, 1985, the opinions, conclusions and recommendations expressed in my letter of May 7th, 1985 and at the deposition taken July 3rd, 1985 remain unchanged.

Yours Truly,

J. C. Moller, M.D.

ADAMS CLINIC, P.A.

August 20, 1985

Jack Fena, Attorney
311 East Howard Street
Hibbing, MN 55746

2229 3RD AVENUE EAST
HIBBING, MN 55746
218/262-3425

400 NW 1ST STREET
CHISHOLM, MN 55719
218/254-3391

Dear Mr. Fena:

As per your request for a medical report on Sharon Kowalski concerning her current medical and psychological condition and her ability to deal with visitations from Karen Thompson, this report is based on an extensive review of her medical and psychological evaluations since her accident on November 13, 1983. This would include reports from Dr. Goff at Polinski Institute in Duluth and her attending physician, Dr. Moller, from the Duluth Clinic and psychiatric reports from Dr. Cowan in Duluth. It is also based on previous court testimony and depositions from various parties involved in this case. It is also based on my direct observation of the patient and observations of personnel at Leisure Hills Nursing Home.

Sharon was originally injured in an automobile accident on November 13, 1983, suffering severe head trauma. This has left her with a severe upper and lower extremity paresis with severe cognitive dysfunction and minimal communication skills. Sharon was recently transferred from Park Point Manor in Duluth to Leisure Hills Nursing Home in Hibbing, and I am currently her attending physician. I visit her on a monthly basis. Based on her

previous records and my observations, I do not feel that Sharon has improved significantly over the past six months. I feel that her mental functioning and cognitive status have stabilized and probably will not significantly improve in the future. I would concur with previous reports that Sharon continues to cognitively function at below a 6 or 7 years of age level, and that she should be classified as a highly vulnerable adult who could easily be subjected to various forms of abuse including manipulation and sexual abuse. Sharon has also suffered recurrent bouts of reactive depression which, according to many medical observers, have been closely associated with her interaction with Karen Thompson. Ms. Thompson has apparently been visiting Sharon on a regular basis for approximately the past week at the Leisure Hills Nursing Home. According to affidavits and statements from individuals who have observed this interaction at Park Point Manor, it has come to my attention that Karen Thompson has been involved in bathing Sharon Kowalski behind a closed door for a prolonged period of time. It has also come to my attention that Ms. Thompson has alleged a sexual relationship with Sharon Kowalski that existed prior to the accident.

Based on this knowledge and my best medical judgement concerning Sharon and her welfare, I feel that visits by Karen Thompson at this time would expose Sharon Kowalski to a high risk of sexual abuse and I also believe that such visits would again expose Sharon to recurrent bouts of reactive depression that have greatly impeded her recovery in the past. I also have been made aware that Karen Thompson has, at times in the past, been involved in directly administering physical thearpy to Sharon Kowalski.

Because of Sharon's physical problems, I feel that such therapy administered by a non-professional could be extremely dangerous to her health and long term recovery. Thus as Sharon's physician, I have directed the Leisure Hill's nursing home staff to allow Karen Thompson to visit Sharon Kowalski under any circumstances and that Sharon is to receive physical therapy only from a qualified therapist. These orders are based on what I feel is in Sharon's best interests from a medical and psychological standpoint.

Sincerely,

/s/ William L. Wilson, M.D.
Adams Clinic, P.A.
Higging, MN 55746

WLW/st

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re: Guardianship of:
Sharon Kowalski
Ward.

AFFIDAVIT OF GEORGE M. COWAN, M.D.

Trial Court Case No. 4497

Appellate Court Case No.
C1-85-1502

STATE OF MINNESOTA)
) SS
COUNTY OF ST. LOUIS)

GEORGE M. COWAN, M.D., Having been first duly sworn upon oath, deposes and says:

1. That my name is George M. Cowan, M.D., and I am a medical doctor whose specialty is psychiatry and I practice in the City of Duluth, Minnesota, and I have been engaged in such practice and specialty for over 35 years and am senior member and founder of Cowan Psychiatric Associates, 330 Medical Arts Building, Duluth, Minnesota;

2. In the latter part of September, 1984, I was posted at Miller/Dwan Hospital for a psychiatric examination of Sharon Kowalski, and I did on or about October 4, 1984, see Sharon Kowalski at Miller/Dwan Hospital. I sent Mr. Jack Fena, attorney for Donald Kowalski, the guardian herein, a medical report dated October 14, 1984, which is attached to this affidavit as Exhibit A;

3. That on or about May 3, 1985 I testified at a trial in Elk River, Minnesota, relative to controversy over Sharon Kawalski's guardianship and visits by Karen Thompson;

4. At that hearing I testified that I had examined Sharon Kowalski and that I had interviewed various nursing home personnel at the Park Point Nursing Home in Duluth. I also reviewed all of her charts and history and nursing home notes and based upon that, and my examination, I testified that Sharon Kowalski was depressed and that in my opinion the depression was caused and exacerbated by the conduct of Karen Thompson during her visits to Sharon Kowalski. It is apparent from the records that Karen Thompson was giving very negative messages to Sharon Kowalski about her parents and about the quality of care that she was receiving at Park Point Manor Nursing Home in Duluth, and her medical care. It was my opinion that Sharon was receiving adequate medical care and nursing home care;

5. At this hearing I also testified that if I had been Sharon's attending physician rather than her psychiatric consultant, I would issue an order banning any contact between Karen Thompson and Sharon Kowalski;

6. I also testified that I have treated gay and lesbian persons and that many gay and lesbian persons do not wish to have their sexual preference or orientation disclosed to third parties, and that many of them keep this a secret. I also testified that gay and lesbian persons most fear disclosure of their sexual preference and orientation to their parents. It is my opinion that the right of disclosure of one's sexual orientation and sexual preference is uniquely an individual's own prerogative;

7. It is my opinion, based upon my examinations and perusal of the medical and nursing home records, that Sharon Kowalski remains profoundly brain damaged and

I agree with the rehabilitation conference report that is hereto attached as Exhibit B;

8. One of the outstanding things that I agree with in this evaluation is on page 3, fourth line from the bottom, which reads in part " . . . her cognitive functioning ability would be below a 6 or 7 year age level . . . . " The entire initial evaluation and history dated October 9, 1984, which took place over a number of days after she was admitted to Nat Polinsky Rehabilitation Unit at Miller/Dwan Hospital and Medical Center on September 14, 1984, was seen and read by myself and used by me in forming my opinions relative to Sharon Kowalski;

9. Sharon Kowalski remains profoundly mentally and physically disabled and this condition is permanent. My opinion remains that total control of Sharon's life should remain in the hands of her parents. I have found through the years that parental love is unconditional and lasting, whereas other associations, many times, disintegrate when there is a change in the status of one of the parties. This would be true in both heterosexual and homosexual relationships, in my opinion;

10. From what I have been able to observe and from consulting with all of her health care personnel at the hospital and nursing home, Sharon Kowalski's parents are doing a commendable and adequate job in administering and looking over their daughter, Sharon Kowalski;

11. It is my further opinion that the notorious publicity given to this matter by the press conferences, television, and news releases of Karen Thompson, and the disclosure of these press releases and news releases by Karen Thompson to Sharon Kowalski, have caused the conflict to

be laid upon Sharon Kowalski and have caused her to be insecure and fearful, therefore throwing her into depression;

12. Therefore, based upon the history, my own examinations, my perusal and study of the hospital and nursing home records, and my interviews of medical and nursing home personnel, it remains my opinion that any contact by Karen Thompson with Sharon Kowalski should be eliminated; it is my further opinion that the continued conflict in this matter creates a very dangerous situation for Sharon Kowalski;

13. In preparation for the making of this affidavit I was given a copy of an affidavit of Janlori Goldman dated August 5, 1985, attached hereto as Exhibit C, and a copy of an affidavit of Amy B. Bromberg dated August 6, 1985, attached hereto as Exhibit D. In both of these affidavits questions relative to representation by attorneys from the Minnesota Civil Liberties Union were asked of Sharon Kowalski and references were made to courts and court procedures;

14. It is my opinion based upon the history, the rehabilitation conference report dated October 9, 1984, conversations with her medical and nursing home personnel, perusal of medical and nursing home records, conferences with her attending physicians, and my own examination of Sharon Kowalski, that she would be unable to understand the questions and use the complex reasoning that would be required to give intelligent answers;

15. The whole, entire history shows that Sharon's brain damage causes her to be totally confused in answering questions. It is my opinion and belief that Sharon

does not have sufficient understanding to make reasoned, intelligent answers to the questions as shown in these affidavits;

16. It is my further opinion that the types of questioning and indication of conflict are very harmful to Sharon Kowalski as I had testified at the trial that similar questions and creating of conflict were harmful to Sharon Kowalski. These would be no different;

FURTHER AFFIANT SAITH NOT Except this affidavit is made for the purpose of indicating to the Court my reasons for my opinion of eliminating contact by Karen Thompson with Sharon Kowalski.

/s/ George M. Cowan, M.D.

Subscribed and sworn to before
me this 27 day of August, 1985.

/s/ Elizabeth Petrovic
Notary Public
(SEAL)

Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1303

In The
Supreme Court of the United States
October Term, 1985

IN RE GUARDIANSHIP OF
SHARON KOWALSKI, WARD

On Petition for Writ of Certiorari
to the Minnesota Supreme Court

CORRECTED COPY

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JACK R. FENA
Counsel of Record
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Guardian of Sharon Kowalski,
Ward

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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ARGUMENT

A. STATEMENT OF THE CASE

Sharon Kowalski, then age 27 years, was severely and permanently injured on November 13, 1983, in an automobile accident when struck by a negligent driver. As a result of the accident Sharon Kowalski is paralyzed and has severe brain injuries and is totally incapacitated, both physically and mentally. (App. 1-7).

Since her injury extensive litigation has taken place surrounding the terms of her guardianship.

On April 25, 1984, the District Court, Probate Division (the Honorable Bruce Douglas) found Sharon to be an incapacitated person and appointed Donald Kowalski, Sharon's father, to be Sharon's guardian. Karen Thompson, who claims to be Sharon's lesbian lover, fought for and was given equal access to visitation with Sharon Kowalski.

Subsequent to that order, Ms. Thompson began a media blitz and disregarded Sharon's well being for her own personal gain. She wrote letters to Sharon's parents claiming a gay relationship. (T339).* She fought to keep Sharon in a nursing home with an 87 year old roommate who chanted 24 hours a day in temperatures that soared to 94 degrees without air conditioning. She made numerous motions to prevent Sharon from receiving optimal care. She consistently and intentionally bombarded Sharon with negative messages about her parents, about being in a dangerous place, about getting good care, about her parents keeping her prisoner and various messages of that

---

* Transcript from Trial Court will be referred to as T —.

sort. (T178). Because of these activities a new trial was held on May 3, 1985 and May 9, 1985.

On July 22, 1985 a new order was created giving Donald Kowalski all of the powers of a guardian and stripped Ms. Thompson of her powers. The order further contemplated complete denial of visitation by Ms. Thompson when it ordered Donald Kowalski to " . . . consider regarding visitation, the recommendation of medical and health care personnel and the needs and desires of the institution wherein the ward resides."

Following the July 22, 1985 order Donald Kowalski, as ordered by the court, followed the advice of four (4) separate medical doctors, all of whom had been Sharon's attending physicians, and terminated contact between Ms. Thompson and his daughter. (App. 8-19).

The Minnesota Civil Liberties Union then filed an appeal on behalf of Sharon Kowalski, claiming to be her representative. Thomas Hayes, the court-appointed representative, also filed an appeal, as did Ms. Thompson. Thomas Hayes also associated the MCLU with him without obtaining the permission of the trial court.

Donald Kowalski moved the Minnesota Court of Appeals to have the MCLU removed as attorneys for Sharon Kowalski and to deny their appeal as they had no standing to represent Sharon. The Minnesota Court of Appeals removed the appeal by the MCLU and also would not allow the MCLU to associate with the court-appointed attorney without order of the trial court. The Minnesota Court of Appeals did grant the MCLU amicus curiae status and allowed them to submit a brief, which they have done.

The MCLU then appealed that decision to the Minnesota Supreme Court and that appeal was dismissed. The MCLU then petitioned the Minnesota Supreme Court for a rehearing and that petition was denied.

The MCLU has throughout this action taken the side of both Karen Thompson and the court-appointed attorney, Thomas Hayes. They have nothing new to add.

———o———

B. DISCUSSION

Sharon Kowalski Is Incapacitated And Lacks The Ability To Hire An Attorney Of Her Own Choice.

In his order of July 23, 1985, the Honorable Bruce Douglas made findings of fact regarding the mental status of Sharon Kowalski. He found in part that:

"2. The ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her person.

4. The ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her estate or financial decisions.

5. The ward has demonstrated behavioral deficits evidencing inability to manage her estate.

8. The ward is incapable of exercising the following rights and powers:

   c. (2nd letter "c") to consent to necessary medical or other professional care, counselling, treatment or service.

12. The ward's ability to respond or communicate has been inconsistent and, at times, unreliable, which situation may or may not improve."

The findings of the trial court are clear that Sharon Kowalski is unable to hire an attorney. Even a response that she requests "help", the basis for the Minnesota Civil Liberties Union intervention in this matter, doesn't give a basis for the Minnesota Civil Liberties Union saying that they have been hired by Sharon. Any incapacitated person desires help, but she is incapable of understanding what type of help the Minnesota Civil Liberties Union can and will give. Dr. Cowan points this out in his August 27, 1985, affidavit (App. 20-24) in which he, Sharon's attending psychiatrist, states that:

> "14. It is my opinion based upon the history, the rehabilitation conference report dated October 9, 1984, conversations with her medical and nursing home personnel, perusal of medical and nursing home records, conferences with her attending physicians, and my own examination of Sharon Kowalski, that she would be unable to understand the questions and use the complex reasoning that would be required to give intelligent answers;
>
> 15. The whole, entire history shows that Sharon's brain damage causes her to be totally confused in answering questions. It is my opinion and belief that Sharon does not have sufficient understanding to make reasoned, intelligent answers to the questions as shown in these affidavits."

Important to note is that the MCLU solicited Sharon Kowalski. They went directly to her attempting to get hired. They went directly to a brain-injured individual who they knew lacked the ability to make decisions, probably at the urging of Ms. Karen Thompson, whom they have sided with all along.

Sharon Kowalski already has a court-appointed attorney who has been actively involved and who brought an appeal. He is advocating exactly what the MCLU is advocating. He filed an appeal of the July 23, 1985 order and the MCLU was granted amicus curiae status for that appeal. Any appeal brought by the MCLU is superfluous and unnecessary and acts only to dissipate the assets of an estate which has already been in court numerous times and continues to be forced to fight requests such as this.

How can an incapacitated ward with mental abilities of a six or seven year old, who gives inconsistent answers, hire an attorney? The answer is simple; she cannot. She doesn't understand what is being asked of her. Karen Thompson has admitted on the stand that she has personally experienced inconsistencies. (T349). The record is replete with inconsistencies, including wrong answers to simple questions such as her age and where she was presently residing. The physicians all point to inconsistencies (App. 8-19) and the court found such inconsistencies in its July 22, 1985 order.

It is clear that the MCLU is not neutral in this matter as they claimed they would be. They smell an issue and seem only to care about the issue. Why do they constantly fight the guardian despite the presence of medical reports contrary to their position.

Counsel's argument that Minn. Stat. § 525.56, Subd. 3(5) gives Sharon the power to approve "contracts for necessity" must be seen in light of the common law history of this concept. Common law gave incapacitated persons the power to contract for necessities to protect people such as merchants and others who contract with persons

who don't know of an incapacity. *Kay v. Kay,* 53 Ariz. 336, 89 P.2d 496, 120 N.E.2d 7; *Granes v. Norris,* 3 Ill.2d 112, 120 N.E.2d 7; *Talbert v. Ellzey,* 203 Miss. 612, 35 So.2d 628. This is not such a case. This matter is a case where the ward must be protected from the MCLU who comes directly to her, knowing of her incapacity, and gets her to respond on her machine that she wants help. This is clearly not what the statute anticipated. The court appointed the firm of Smith, Pringle & Hayes because the court knew and saw that Sharon was incapable of approving any contract. The court dealt with attorneys when they found that Sharon was incapable of consenting to ". . . other professional care . . ."

The appellants' use of criminal law cases to support their view is erroneous. This case is in no way similar to those cases where the parties have the mental capacity to make a determination. Where a party is unable to make that determination, it should not be the MCLU's right to make a determination that they have been hired. To protect the ward, the decision must be left in the hands of the court, not any attorney who comes around looking for work or smelling an issue.

———o———

CONCLUSION

For these reasons, a Writ of Certiorari should be denied.

Respectfully submitted,

DONALD KOWALSKI, Court-Appointed
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JACK R. FENA
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Attorneys for Donald Kowalski,
Guardian of Sharon Kowalski,
Ward

App. 1

INITIAL EVALUATION 10-9-84

REHABILITATION CONFERENCE

MILLER-DWAN HOSPITAL AND MEDICAL CENTER
and
NAT G. POLINSKY MEMORIAL
REHABILITATION CENTER

Rehabilitation Conference
Form MH-41

KOWALSKI, Sharon

MR # 10-48-52

R 305-1

Dr. S. K. Goff

date: 10/9/84

INITIAL EVALUATION

This is a 28-year-old woman who was admitted to the Rehabilitation Unit on 9/14/84 for a rehabilitation evaluation. She was involved in a motor vehicle accident Nov. 13, 1983. She sustained a severe closed head injury. Her emergency care was at St. Cloud Hospital. According to the reports, a CT scan at that time demonstrated a right temporal contusion, multiple areas consist with scattered cerebral hemorrhages. She was breathing spontaneously and demonstrated fixed flexion posturing of right side. Also had other injuries, including a fractured femur which required open reduction, subsequent fever spikes and wound infection problems following this. Subsequently seizure activity was demonstrated by EEG and she was placed on Dilantin therapy. She was hospitalized at St. Cloud from Nov. until July of 1984, then was transferred to the Country Manor Nursing Home in Sartell, Mn fol-

lowing this. According to the accompanied medical notes, her progress was extremely slow. Because of the severity of her injury and her slow progress, it was felt by her attending physicians that she would not benefit from an intensive rehab course at that time. She did have a rehab review by Dr. Keith Sperling sometime during her stay, a physiatrist from the University of MN. His report was not available. He did suggest that she be placed on Didronel to prevent heterotopic ossification. She did receive daily physical therapy at the Country Manor Nursing Home and occupational therapy, apparently some intermittent speech therapy, though the frequencies of these are unknown at this time. She was on medications at the time of her transfer, in the form of Dilantin 200 mg. b.i.d.; Symmetr 100 mg. b.i.d.; and was on tube feedings. She was allergic to Penicillin. Past medical history was unremarkable. Medical course during this stay has been unremarkable. She was seen in neurologic consultation and head to the right, both arms in flexion posturing, and spontaneous movements of the right hand were noted with marked proximal apasticity. Reflexes were hyperreflexic, bilateral plants extensor responses were noted in the lower extremities. Her yes/no responses seemed unreliable. Right Abducens palsy was demonstrated and some vertical nystagmus with antisocoric pupils. Markedly spasticity of her palate movements and increased gag reflex were noted. Dr. Holt suggested checking the CT scan to document the severity of posterior fossa injury, in addition to the cerebral injury, and rechecking an EEG. With the severity of the bulbar findings, a gastroscopy was recommended. If not done, a trial of Lioresal or Dantrium could be undertaken. CT scan did show some asymmetry be-

tween the size of the lateral ventricles, the right being more prominent than the left. Posterior fossa was unremarkable.

REVIEW OF HER REHAB PROBLEMS:

1) *Home situation*—The patient is single and was born in Grand Rapids. Grew up in the Nashwauk area. Has a 26-year-old sister in Hibbing; a 24-year-old brother in St. Peter. Both living maternal grandparents; 1 living paternal grandparent. Prior to her injury, the patient was living in St. Cloud. Her parents live in Nashwauk. Father is retired from Hanna Mining, but does do some self-employed work at this time in landscaping. Her mother is a homemaker. Patient did complete a high school education. She went to college in Bemidji, Hibbing Junior College, and graduated from St. Cloud as a physical education instructor. She had been layed off, however since the spring of 1983 and had reportedly been discouraged prior to her accident about lack of employment. She is generally interested in physical activity, sports of all kinds, outdoor activities. Prior to her accident, she lived in the home of Karen Thompson in St. Cloud. At this time, ultimate home disposition planning has not been decided. Currently the matter regarding disposition and guardianship is in the hands of the District Court in St. Cloud. Guardianship is currently being held by the father. As we understand, the matter is going to be settled in the Court in mid October. Disposition planning, thus, will have to wait until this decision is made. If parents are granted guardianship, parents would prefer Sharon to remain within reasonable commuting distance of their home, and ultimately if home care is possible, they would like to pursue this possibility.

If she goes back to St. Cloud, she would most likely be back initially to the St. Cloud Nursing Home. If Karen Thompson is granted guardianship, she would eventually like to care for Sharon in her home. Currently the patient's medical care is being supported by Minnesota Medical Assistance. Her application for Social Security has been made and litigation is also pending. Also investigation into a supplemental insurance policy.

2) *Communication and cognitive dysfunction*--The patient was evaluated in detail by both the psychologist and the speech therapist. The following is a summary of their findings. Because of the limited cognitive capabilities of this patient, the testing was informal. In many tests only portions of the tests could be applied. Portions of the Minnesota test for the different diagnosis of aphasia; the Wigg-Semel test of linguistic concepts, the Peabody Picture Vocabulary test; the Peabody Individual Achievement test were administered. Auditory comprehension felt to be severely impaired, meaning that her responses were inconsistent and spotty. She had limited expressive abilities which also limited evaluation of auditory comprehension. The patient was tested with yes/no responses by head nods, scanning, position to pointing using the fingers of the right hand, positioned statements using finger movements, following directions and scanned by the examiner. In scanning the examiner goes over a series of response choices, responding by pointing to each item hoping to elicit a response from the patient. The examiner felt that responses to all modes of communication were inconsistent. The results tended to be different with the same question getting different responses. It was noted that there was no consistency between which modes

seemed to work the best. Variation was not related to temporal relationship or the patient's condition. Therapist felt that the scanning modalities and the position pointing responses were most successful. The most ineffective and unreliable response mode was the finger response to a conditioned question or statement. Patient's ability to follow direction was tested in detail. She was presented with body commands, as "raise your hand". With repeat efforts, she responded accurately to only one command out of seven. When the commands, however were repeated and gestures were added, she could respond in an improved manner, and in this case respond to three more of the commands (out of seven). Plus it was felt that she inconsistently comprehended commands. It was apparent that gesturing enhanced understanding. The therapist felt that repetition of a command did not necessarily increase the ability to comprehend. Her ability to understand words, sentence and paragraphs was also tested. Comprehension of common words using the scanning response system was 100% accurate. This was the only consistent performance noted by the therapist during her entire examination. Pointing responses were generally ineffective. She was definitely correct only 50% of the time. Part of this limitation may have been her spasticity and postural limitations. The Peabody Picture Vocabulary test where the patient selected one of four pictures responding to a presented word with the scanning response mode produced variable responses. Initially responded to 13 of 14 items. Then was inconsistent in her responses following that. The Minnesota test, looking at sentence level understanding, demonstrated variability, using all modes of responsiveness. She responded to 12 of 15 general yes/

no questions with head nods. This was not the standard and usually she did not do this well. Part of this was due to the difficulty detecting definitive head nod. The therapist felt therefore that this was an ineffective measure of comprehension. Using the scanning system she was felt to be at essentially a chance level in her responses. Given a descriptive statement regarding a single picture, she was 80% accurate in responding by moving the corresponding finger. On the Minnesota test, she was unable to accurately answer yes/no questions of paragraph length material. No response was felt to be effective. Therefore, the conclusion was that she could comprehend inconsistently at a common word level and sentence level; unable to comprehend paragraph length material. Her ability to comprehend conditional statements was also tested. These consisted of rather concrete personal questions, such as, "If your hair is red, move your finger", and higher levels of information, such as, "If lunch comes before breakfast, move your finger". It is felt by the examiner that these conditional statements were beyond the patient's ability as to understand, and this included both the concrete personal areas and higher level areas. The Reading ability was also tested and indicated a severe impairment. The Minnesota test showed the recognition of words was 87% accurate with position pointing system, 75% accurate with a scanning system. The level of comprehension was also assessed. Responses to general yes/no questions were variable. Head nod responses were at the chance level. In the Peabody Individual Achievement test, no basal score could be obtained. This required the patient to read a sentence and select one possible picture of four which corresponded to the sentence. The examiner felt in sum-

mary that the patient was able to inconsistently read and comprehend at the single word level. Expressive communication was evaluated and felt to be severely to profoundly impaired. During the evaluation sessions, speech was observed. Spontaneous verbalizations were noted and that did not appear to be purposeful or reactive. No voicing to command was noted. She was observed on a videotape to be imitating vowels. It was noted that she may have done a bit of humming during her physical therapy sessions. The therapist felt also that yes/no responses observed through head nods as a response mode were not reliable. Pointing responses were functionally poor for physical reasons with her accuracy often depending on where the response was located on the page before her. Many of her responses were noted to be left to the interpretation or assumptions by the observer. It was felt that the one finger—yes, two fingers—no, modality was not functional or was felt that scanning is a system that the patient could use, although the consistency of her responses was adversely affected by her decreased comprehension. A number of non-vocal systems were tried using alphabet boards, mechanic communicator and others. Physical limitations complicated use of these devices. For example, she was able to find the "S" on the alphabet board to spell her name, but could not find the second letter. Her writing skills demonstate a severe to profound impairment. She could write her first and last name with partial and variable legibility. Could not write letters to dictation legibly, and all attempts to write common words to dictation were not legible. Did not respond when asked to write numbers. Oral motor function was evaluated. Trace movement of her lips were noted. Chewing-type

movements were spontaneously noted of the jaw. The tongue could be brought to the lips. Spontaneous voicing was occasionally heard, but not on command during sessions. She had a hyperactive gag reflex and could not swallow on command. Because of these difficulties, a barium swallow was subsequently recommended. The overall summary of the speech function is that she does demonstrate scattered emerging abilities in all areas tested. The patient was also seen by the psychologist for recognitive evaluation over a period of several days to try to evaluate consistency. She was administered several formal psychometric tests and a variety of informal test materials. As to her difficulty in responding consistently, she was unable to complete any of this formal testing. Testing tried by the psychologist included the color form preference subtest, the recognitive diagnostic battery, a test of non-verbal intelligency, collected items from the Stanford-Binne-Intelligence Scale. On the color form preference subtest, in which patient shows preference for color indicates a level of responding, which is less mature developmentally than individual responding to form stimuli. Based on this subtest, her cognitive functioning ability would be below a 6 or 7 year age level. With tests of non-verbal intelligence and a language free test of non-verbal intelligence, she was only able to obtain three correct responses of six on the pratical ones. A full-scale test was not administered because of performance on the initial items. A full-scale test was not administered because of performance on the initial practice item. Multiple items from the Standford-Binne' were administered, including identifying objects, body parts and including a delayed response for items at year level two. She was able to identfy body parts

and was able to accurately locate some objects. Some of the responses were difficult to interpret for reasons indicated in the speech evaluation. She was able to correctly identify however, on the delayed response which box a small object was hidden under. Test results and observations indicate cognitive function to be severely impaired. Her attention processes were felt to be good. She could make appropriate eye contact with testing material. Performance on the delayed response test does suggest that her ability to concentrate without distraction is a relative strength. Memory abilities are difficult to assess with this degree of impairment. They do seem to be relatively intact for simple identification of objects. This would indicate that her memory storage of verbally acquired information is present for some items, but the extent of her memory is not known, but is likely to be greatly diminished compared to premorbid levels. Her information processing in general was inconsistent, though she demonstrated appropriate responding, slow responding and occasionally no responding to test material. This was made difficult again for reasons stated in the speech evaluation, but it also reflects a slow information processing speed. She did not demonstrate any behaviors which would indicate any initiative on her part. She did demonstrate simple reasoning skills and ability to respond to commands. She did show a tendency to perseverate, indicative of a low developmental level of cognition. Her learning ability is likely to best consist of a repetitive stimulation and shaping of her responses. Much of her expressive repertoire at this time seemed to reflect overlearned responses to some degree, as demonstrated by her ability to point her finger. The examiner felt that the test results and inter-

pretations reflect an estimate of her current cognitive skill, compounded by her limited output modalities. It is felt by the psychologist that at a functional level, she was in a severe range of impairment. He felt, however, that her actual cognitive function at times may be higher, which would be consistent to a head injury, when at times islands of increased function appear. It is likely that her judgment or ability to make decisions for herself would be severely impaired, significantly due to her difficulty establishing a reliable means of communication. It is very easy to lead her responses, misinterpretate her gestures. This supports the opinion of the psychologist that she is not able to make judgments and decisions on her own.

3) *Upper extremity paresis*—This shows motor spasticity and flexor tone bilaterally, particularly proximally with significant fluctuation of this tone. Her activement movement is restricted to distal function on the right from the elbow to the fingers. No significant subluxetion of the shoulder was noted. Passive range of motion is from 0-90 degrees for shoulder abduction, 0-110 degrees of flexion of the shoulder. The remainder of her movements in her upper extremities can be stretched to within normal limits on the left, except for a neutral position of her wrist. On the right, there is 65 degrees of shoulder abduction, 40 degrees of shoulder flexion, ¾ range of forearm supination. Motion is resisted more on the right. Relaxation does encourage increased range of motion and a greater range of motion can be obtained supine rather than sitting. No carry-over of relaxation was noted. Motor skill could not be effectively formally evaluated, however she did demonstrate full active elbow flexion/extension, wrist flexion, finger flexion/extension, and ¾ active wrist exten-

sion. Grip strength on the right was measured at 15 lbs. Lateral pinch 6.5 lbs., and 2-point pinch 2 lbs.; all below the 10th percentile for her age. In the left upper extremity, only slight positional movements of the 5th fingers were noted but were nonfunctional. Functional use could not be formally evaluated. She could do a gross grasp and release with items as small as a paper clip. She had difficulty placing any objects because of her proximal dysfunction. She was able to actively flex her elbow in a functional manner, such as lifting her arm off a table. She did demonstrate the ability to use a dowel to point to objects and was able to wipe her mouth, but it was inconsistent. She was occasionally spontaneously noted to scratch her head or rub her nose. She can hold a pen in a functional writing position once it is placed. All movements were noted to be very slow. Sensation could not be adequately evaluated in her upper extremities. There was no evidence at least of severe tactile impairment.

4) *Visual dysfunction*—She does wear glasses, but apparently does not have a current prescription due to the accident. She can visually track in all directions. Loses track of objects at about 45 degrees to the right and the left. Her head is in the midline. Good tracking upward is noted, but not downward. As previously noted, she does have a right Abducens palsy and nystagmus, resulting in disconjugate eye movements. Formal visual testing would not be possible with this level of cooperation.

5) *ADL's*—Patient is completely dependent in her ADL's at this point. She can comb the front of her hair and bring her toothbrush to her mouth, but is not functional enough to carry through with these activities. Sig-

nificant verbal cuing is needed. The bladder is handled by diapers. Attempts have been made to evaluate her ability to void on regular intervals, but this has not been successful as of yet.

6) *Swallowing*—See the speech evaluation above for evaluation of oral-motor function. In addition, she did have a barium swallow. When the bolus was placed in her oral cavity, it was noted that there was no attempt to make the opaque into a bolus in preparation to initiate the swallowing reflex. Swallowing did not follow. When the swallowing reflexes was initiated, the barium did move readily through the pharynx and the hypopharynx and showed nomal esophagus motility. On occasion, however, the barium would leave the oral cavity as she extended her neck, and it would rest in the valleculsae without initiation of the swallowing reflex. On occasion during the swallow, the patient did aspirate the barium into the larynx and proximal trachea. Conclusion of this swallow was that it confirmed marked neuromotor discoordination, inappropriate initiation of the swallowing reflex, poor bolus formation and demonstrated a significant threat of aspiration. These findings would go along with the history that the patient has occasionally swallowed.

7) *Lower extremity disfunction*—formal testing is not possible and range of motion varied according to relaxation techniques at the time. On the right, her hip flexion was 95 degrees, and extension lacked 5 degrees. Knee flexion and planter flexion were normal. Abduction was limited on the right to 25-30 degrees. It was noted that the patient could actively abduct her knees. On the left, she was generally tighter. Extension lacked 30-40 degrees, abduction was approximately 10-15 degrees, dorsiflexion

lacked 20-25 degrees. She does show active control of the right lower extremity against gravity with her hip flexion, knee flexion and hip extension and knee extension. Hip abduction and adduction were seen with gravity eliminated. Traces of movement were noted inconsistently in the left. Hypertonicity was not in both lower extremities, particularly on the left. Adductor tone was noted in all positions. This could be released with relaxation techniques. Minimal reciprocal movements were noted in the right lower extremity.

8) *Dysmobility*—Patient was unable to initiate rolling on the mat, but she can turn her head in the direction of the roll. No trunk rotation was seen with any activities. No active illegible extension was noted during the prone position. A lack of head control was noted when she was prone over the bolster. Increased arm tone was noted during that time. She had poor balance in the sitting position, sitting in a flexed posture. Much relaxation must be effected before her feet can be placed flat on the floor. Little trunk control and head control were noted during sitting. That which is seen when constant verbal commands are presented, thus she needs moderate to maximal assist of one to sit. At times, she is able to extend her right arm and grip the side of the mat, thus hold herself up for short periods of time. Transfers from wheelchair to mat require maximum assistance of two, with a pick up or a standing pivot transfer. She has not had enough active lower extremity activity or weight bearing abilities to make her a candidate for gait activities. The wheelchair posture with a highback chair was poor. She tended to sit with weight bearing on the left hip, the right hip retracted. The head was generally flexed and rotated. The

lower extremities tend to be strongly adducted and the right leg tends to be in the extended position.

9) *Spasticity*—Has been described in the extremity exams above. There is marked spasticity and variable tone in all 4 extremities. Tone is affected by timing, positioning. She has been on Symmetrel in the past. It is not known whether she had been on a trial of Lioresal or Dantrium. She has not had any surgical procedure for spasticity control.

10) *Behavior and adjustment*—During her therapy sessions, she has been somewhat variable, at times alert, and at times lethargic. Her attention span has been inconsistent, but as noted above, at times has been quite good. She has been noted at times to respond during the full ½-hour treatment session. Other times, there has been little response. There does not seem to be any pattern with this level of responsiveness, which is what one would expect secondary to the head injury. Her appearance is that of a tendency for her head to be held in a flexed, slumped posture, turning her head to command. No spontaneous communication behaviors were noted. There has been no belligerent behavior. It is difficult with her to ascribe her periods of "withdrawn behavior" to behavioral dysfunction, or simply to alterations of level of consciousness. During her periods of less alertness, she would automatically appear withdrawn. Therapists all felt that her level of cooperation or variable did not change significantly throughout her stay. The variability of her cooperation did not seem to be affected by who was present in the room.

11) *Assessment and recommendations*—Patient's overall level indicates a severe level of impairment, like

significant brainstem and cerebral dysfunction. She is now 11 months post-injury. Limited improvement, neurologically speaking, can be expected. The previous pattern of very slow improvement could well continue for an extended period of time. Although this is highly variable, most patients are described as improving cognitively for a period of one year after injury, whereas the motor improvements may well extend to 2 or 3 years. This does not preclude the possibility that some improvement may occur through behavioral means and training methods. It is felt that at this point the patient is incompetent to make decisions regarding her own welfare, and she is not able to make judgments or decisions on her own.

12) *Recommendations*—

1) At this time, feeding should be held. Aspiration has been demonstrated. There is a definite threat for silent aspiration of oral materials into her lung. For this reason, a feeding gastrostomy was performed. It was suggested that this be used and her feeding function could be re-evaluated at 3 month intervals. If the threat for aspiration decreased, her oral feeding could be accomplished at that time. It would be permissible for small amounts of fluids in her mouth, and such things as lemon-flavored oral swabs.

2) Spasticity is a significant problem at this point. Continued observations on the part of the therapists as to which positions facilitate relaxation should be continued and this reported to the nursing staff. If she has not had a trial of Lioresal, this would be recommended to see if it would functionally improve her posture, her ability to use her right arm, and her head control. At this point, we would not consider her a candidate for more definitive spasticity treatments, that is neu-

rosurgical or orthopedic procedures, because of her poor level of motor function and her decreased level of cognitive function.

3) She should have a special wheelchair. There are several avenues that may be explored, one would be purchase of a stock wheelchair with a variety of bolster attachments, foot boards, lap boards to accomplish good positioning. She would require a high-back system, good head support, shoulder support system, a knee separator to prevent excess abduction. She will require experimentation of hip and knee position to facilitate relaxation.

4) It is felt that because of her severe impairment and slow rate of recovery, and limitations of potential, prolonged in-patient rehabilitation in a hospital unit would not be indicated at this time. It is recommended, however, that she does continue in an on-going rehab program. Components of this program should include daily physical therapy, daily occupational therapy, and daily speech therapy for a period of time such that progress can be closely monitored and evaluated. Also a psychologists contribution to cognitive re-training and monitoring would be desirable. Specific recommendation of individual therapists could be obtained by perusing their reports. It was felt important by the therapists that this close follow-up be indicated, because of the difficulty of assessing the accuracy of this patient's responses. For this reason, any program using persons other than therapists would need to be monitored and directed because of the potential problem of presenting materials that were inappropriate or too advanced for this patient. At this point, the ultimate disposition of this patient is uncertain for reasons stated in the report. It is felt that eventually she could be cared for in a home situation. However, it was felt in her best interest

that this would not be appropriate at this time for the above stated reasons. If the patient were to remain in the Duluth area, the most appropriate program could be obtained at Park Point Manor Nursing Home. This facility has a skilled rehabilitation section, specifically used for the young physically handicapped adult. To my knowledge, there are only 3 of those units currently in the State of MN. The residence does offer the comprehensive approach recommended. Approximately ⅓ to ½ of their patients were head injured patients and would provide a milieu of similarly injured patients undergoing similar therapies and in a similar age group. This would give the opportunity for medical follow-up, which should occur as well. Were she to remain in this area, we would see her at approximately monthly intervals. If she were to remain in another area, this responsibility would then be assumed by a physician in that area.

S. K. GOFF, M.D.

SKG/slh
D&T: 10/9/84

218-727-7451

Cowan Psychiatric Associates, Ltd.

330 Medical Arts Building
Duluth, Minnesota 55802

October 15, 1984

Jack Fena
Attorney at Law
P.O. Box 667
Hibbing, Minnesota

Re: Sharon Kowalski

Dear Mr. Fena:

Please be advised that at your request I interviewed Sharon Kowalski at Miller Dwan Hospital on October 4, 1984. Prior to my examination, I reviewed the chart.

Sharon was lying quietly in bed, appearing to be completely helpess. When I came into her room, the nurse was putting on her night clothes.

I attempted to interview Sharon but she was unable to speak. I was informed that she could answer questions by blinking once for a yes answer and two for a no answer. I proceeded therefore to determine if she was well oriented etc but when she did respond her answers were inconsistent. At one time she would blink once and when the same question was repeated she would blink twice.

Apparently Ms. Kowalski will require a fairly prolonged period of nursing home care along with some intensive physiotherapy and possibly psychotherapy if her condition improves to the point where she is amenable to such therapy. However at this point and in the immediate future she will require a great deal of tender loving care and parental love which is unconditional.

Sincerely,

/s/ George M. Cowan, M.D.

GMC/me

400 East Third
Duluth, MN 55805

THE DULUTH CLINIC, LTD.

December 20, 1984

Mr. Jack Fena
Attorney at Law
PO Box 667
311 East Howard Street
Hibbing, Minnesota 55746

RE: SHARON KOWALSKI
DC# 63 38 98

Dear Mr. Fena:

I saw Miss Sharon Kowalski at Park Point Manor on December 13, 1984 and spent some time with her, trying to assess how easy it is to communicate with her, how well she comprehends and if she is able to make significant decisions. I spent at least half an hour with Sharon. We were in a quiet, well lit room without any interference. She was sitting in a chair. She was alert and she was cooperative to the best of her ability.

She is severely impaired physically due to her closed head injury in 1983 and has only very limited ability to move her right hand and the fingers of her right hand. She is unable to speak or swallow. She is unable to move her other extremities. She has been given a small electronic computer printer which prints out messages on a strip of paper when she presses the letters with a pencil. This requires only light touch. She was able to spell the word cat. I asked her to spell her name, Sharon, but she only wrote SA. Using this little printer may turn out to be

very helpful; however at the present it is a very time consuming task for her and I did not try to get further information in this manner.

I presented her with a series of nonstructured statements or questions to which she could answer "yes" or "no" by moving her index finger or her thumb. I shall list these statements and questions and her replies separately.

It appears to me that there was quite a bit of inconsistency in her answers. She is apparently not aware of the fact that she is at Park Point Manor in Duluth, but thinks that she is at the Country Manor Nursing Home in St. Cloud. She does not understand the word "parents", which apparently is too abstract for her. It appears that she likes her mother, her father and Karen Thompson and enjoys their company. She thinks of Karen Thompson as a good friend.

I do not believe that Sharon Kowalski is able to make any significant decisions as to her future care. She had extensive psychological evaluation in October at Miller Dwan Hospital. At that time, it was felt that she was functioning mentally at a level below six or seven years of age and it is my opinion that she continues to function at this level. It is also my opinion that it is appropriate for her father as her parent to retain guardianship of his daughter.

I would expect that any improvement in her physical or mental condition will only be slight.

I do not believe that it would be appropriate for Sharon Kowalski to appear in court at this time because it would be too stressful and confusing an experience for her. I

believe it would be all right for her to visit her family at Christmas since they are able to take care of her physical needs on a short time basis at this time.

Yours truly,

/s/ J. C. Moller, M.D.

JCM:rhe

Enclosure

INTERVIEW WITH SHARON KOWALSKI 12/13/84
J. C. MOLLER, M.D.

This is Duluth	No*
The sun is shining	Yes
It is raining	No
It is snowing	No
This is Grand Rapids	No
This is Nashwauk	Yes*
This is Duluth	No*
Your sitting in a chair	Yes
Is this Minneapolis?	No
The sun is shining	No*
Do you like ice cream?	Yes
Do you like hamburgers?	Yes
Do you like to watch TV?	Yes
The sun is shining	Yes
Do you want to live with your parents?	No

*ANSWER IS INCONSISTENT

Do you want to stay in a Nursing Home? No

Do you want to live by yourself? Yes*

Do you want to live with your father? Yes

Do you want to live with your mother? Yes

(the patient apparently does not understand the meaning of the word "parents".)

Do you like Karen? Yes

Do you want to live with Karen? Yes

Does Karen live in Duluth? No

Does Karen live in Minneapolis? No

*ANSWER IS INCONSISTENT

INTERVIEW WITH SHARON KOWALSKI 12/13/84
J. C. MOLLER, M.D.

Does Karen live in Grand Rapid? No

Did you know Karen when you were a little girl? No

Have you known Karen for five years? Yes

Have you known Karen for one year? Yes

Have you known Karen for more than one year? Yes

Did you teach Physical Education? Yes

Do you think Christmas is coming soon? Yes

Do you want to go home?	Yes
Would you like to live with your parents?	No*
Would you like to live with Karen?	Yes
Has Karen been good to you?	Yes
Do you like it here?	Yes
Do you like to read?	Yes
Can you swim?	No
Is this a nursing home?	No*
Is thus Duluth?	No*
Is this Chicago?	No
Is this Nashwauk?	No
Is this Grand Rapids?	No
Is this Superior?	No
Have you been at Miller Dwan Hospital?	No*
Have you been to Duluth?	Yes
Are we in Duluth?	No*

*ANSWER IS INCONSISTENT

INTERVIEW WITH SHARON KOWALSKI 12/13/84
J. C. MOLLER, M.D.

Are we in Grand Rapids?	No
Are we at Country Manor?	Yes*
Are we at Park Point Manor?	No*
Is it winter?	No*
Is it dark?	No

*ANSWER IS INCONSISTENT

Is it snowing?	No
Is this St. Cloud?	Yes*
Does your father live in St. Cloud?	No
Does your father live in Nashwauk?	Yes
Would you like to live with your father?	Yes
Would you like to live with your mother?	Yes
Would you like to live with Karen?	Yes
Do you want to live here?	Yes
Would you like to live in Minneapolis?	No
You are in Duluth, do you believe that?	No*
Would you like to go back to bed?	Yes
Do you hurt anyplace?	Yes
Does your head hurt?	Yes
Do you hurt anywhere else?	Yes
Do you hurt everywhere?	Yes
Does your toe hurt?	Yes
Does your hair hurt?	Yes

*ANSWER IS INCONSISTENT

THE DULUTH CLINIC, LTD.

400 East Third Street
Duluth, MN 55805

Mr. Jack Fena
Attorney at Law
PO Box 667
Hibbing, MN 55746

May 7th, 1985

Dear Mr. Fena,

I see Sharon Kowalski briefly once a month at Park Point Manor Nursing Home. On my visit May 6th, 1985 she was noncommunicative and appeared depressed. I conferred with the nurses who take care of her; they tell me that after Miss Karen Thompson's visits with the patient she seems more depressed and curls up in a fetal position. The nurses consider Miss Thompson's visits as abusive to a vulnerable adult.

In our local newspaper I have read that Miss Kowalski types sentence long messages to Miss Thompson on her small communicating machine; I seriously question her ability to do so spontaneously. I saw Miss Kowalski use this tool in December, 1984, and it was cumbersome for her to type out short single words; at that time she was unable to type out her own name.

In my opinion, Miss Kowalski remains unable to make any significant decisions and she is a highly vulnerable adult. In my opinion the the visits of Miss Karen Thompson are disruptive and harmful and therefore not in the best interest of the patient.

Yours Truly,

J. C. Moller, M.D.

THE DULUTH CLINIC, LTD.

400 East Third Street
Duluth, MN 55805
218/722-8364

May 8, 1985

TO WHOM IT MAY CONCERN

RE: SHARON KOWALSKI

DULUTH CLINIC# 63-38-98

The situation with Sharon Kowalski at Park Point Manor was reviewed by this examiner, with two other doctors involved with the case, Doctor Moller and Doctor George Cowan. I also have discussed the situation with one of the head nurses at Park Point Manor, and have asked for a psychological assessment by Jerry Henkel-Johnson, the psychologist at Park Point. Everybody did agree that Sharon become more depressed recently, and because of this, I did look towards the two psychologists and Doctor Cowan, the psychiatrist, for supporting recommendations as to the best way to handle this problem.

In discussing the situation with Doctor Cowan, he very specifically stated that he felt that the patient was suffering from a reactive depression, largely based upon her reactions to statements that she heard from Karen Thompson. He felt specifically that this was the case, and not that Sharon was depressed because of withdrawal from companionship or from withdrawal from the St. Cloud environment. Doctor Cowan reported that he had indeed documented negative response on the part of the patient to statements made specifically by Karen Thompson. We are both in agreement that the current cognitive status of Sharon does not allow for any sophisticated interpretation on her part of statements made to her by others. Thus, the suggestion by Karen Thompson that she was not in the

proper environment of an institution could potentially have very negative effects on her. This opinion was also echoed by her attending physician, Doctor Moller, who has been seeing her on a monthly basis at Park Point.

Thus, based on my own assessment and the recommendations of these two physicians, the staff at Park Point, I do concur with their recommendations that accessibility to Sharon on the part of Karen Thompson should be eliminated. It was Doctor Cowan's recommendation that there be no interaction between these two individuals at this time. Obviously, follow-up in this situation would be needed, both by the psychologists involved, the staff at Park Point, and Doctor Cowan.

Sincerely,

/s/ Steven K. Goff, M.D.
Physical Medicine and Rehabilitation

SKG/BJH

THE DULUTH CLINIC, LTD.

400 East Third Street
Duluth, MN 55805

J. Fena, Att.-at-Law
311 E. Howard Street
P.O. Box 667
Hibbing, Minn. 55746

July 25, 1985

Dear Mr. Fena: Re/ Sharon Kowalski

As of to-day, July 25th, 1985, the opinions, conclusions and recommendations expressed in my letter of May 7th, 1985 and at the deposition taken July 3rd, 1985 remain unchanged.

Yours Truly,

J. C. Moller, M.D.

ADAMS CLINIC, P.A.

August 20, 1985

Jack Fena, Attorney
311 East Howard Street
Hibbing, MN 55746

2229 3RD AVENUE EAST
HIBBING, MN 55746
218/262-3425

400 NW 1ST STREET
CHISHOLM, MN 55719
218/254-3391

Dear Mr. Fena:

As per your request for a medical report on Sharon Kowalski concerning her current medical and psychological condition and her ability to deal with visitations from Karen Thompson, this report is based on an extensive review of her medical and psychological evaluations since her accident on November 13, 1983. This would include reports from Dr. Goff at Polinski Institute in Duluth and her attending physician, Dr. Moller, from the Duluth Clinic and psychiatric reports from Dr. Cowan in Duluth. It is also based on previous court testimony and depositions from various parties involved in this case. It is also based on my direct observation of the patient and observations of personnel at Leisure Hills Nursing Home.

Sharon was originally injured in an automobile accident on November 13, 1983, suffering severe head trauma. This has left her with a severe upper and lower extremity paresis with severe cognitive dysfunction and minimal communication skills. Sharon was recently transferred from Park Point Manor in Duluth to Leisure Hills Nursing Home in Hibbing, and I am currently her attending physician. I visit her on a monthly basis. Based on her

previous records and my observations, I do not feel that Sharon has improved significantly over the past six months. I feel that her mental functioning and cognitive status have stabilized and probably will not significantly improve in the future. I would concur with previous reports that Sharon continues to cognitively function at below a 6 or 7 years of age level, and that she should be classified as a highly vulnerable adult who could easily be subjected to various forms of abuse including manipulation and sexual abuse. Sharon has also suffered recurrent bouts of reactive depression which, according to many medical observers, have been closely associated with her interaction with Karen Thompson. Ms. Thompson has apparently been visiting Sharon on a regular basis for approximately the past week at the Leisure Hills Nursing Home. According to affidavits and statements from individuals who have observed this interaction at Park Point Manor, it has come to my attention that Karen Thompson has been involved in bathing Sharon Kowalski behind a closed door for a prolonged period of time. It has also come to my attention that Ms. Thompson has alleged a sexual relationship with Sharon Kowalski that existed prior to the accident.

Based on this knowledge and my best medical judgement concerning Sharon and her welfare, I feel that visits by Karen Thompson at this time would expose Sharon Kowalski to a high risk of sexual abuse and I also believe that such visits would again expose Sharon to recurrent bouts of reactive depression that have greatly impeded her recovery in the past. I also have been made aware that Karen Thompson has, at times in the past, been involved in directly administering physical thearpy to Sharon Kowalski.

Because of Sharon's physical problems, I feel that such therapy administered by a non-professional could be extremely dangerous to her health and long term recovery. Thus as Sharon's physician, I have directed the Leisure Hill's nursing home staff not to allow Karen Thompson to visit Sharon Kowalski under any circumstances and that Sharon is to receive physical therapy only from a qualified therapist. These orders are based on what I feel is in Sharon's best interests from a medical and psychological standpoint.

Sincerely,

/s/ William L. Wilson, M.D.
Adams Clinic, P.A.
Hibbing, MN 55746

WLW/st

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re: Guardianship of:
Sharon Kowalski
Ward.

AFFIDAVIT OF GEORGE M. COWAN, M.D.

Trial Court Case No. 4497

Appellate Court Case No.
C1-85-1502

STATE OF MINNESOTA)
) SS
COUNTY OF ST. LOUIS)

GEORGE M. COWAN, M.D., Having been first duly sworn upon oath, deposes and says:

1. That my name is George M. Cowan, M.D., and I am a medical doctor whose specialty is psychiatry and I practice in the City of Duluth, Minnesota, and I have been engaged in such practice and specialty for over 35 years and am senior member and founder of Cowan Psychiatric Associates, 330 Medical Arts Building, Duluth, Minnesota;

2. In the latter part of September, 1984, I was posted at Miller/Dwan Hospital for a psychiatric examination of Sharon Kowalski, and I did on or about October 4, 1984, see Sharon Kowalski at Miller/Dwan Hospital. I sent Mr. Jack Fena, attorney for Donald Kowalski, the guardian herein, a medical report dated October 14, 1984, which is attached to this affidavit as Exhibit A;

3. That on or about May 3, 1985 I testified at a trial in Elk River, Minnesota, relative to controversy over Sharon Kawalski's guardianship and visits by Karen Thompson;

4. At that hearing I testified that I had examined Sharon Kowalski and that I had interviewed various nursing home personnel at the Park Point Nursing Home in Duluth. I also reviewed all of her charts and history and nursing home notes and based upon that, and my examination, I testified that Sharon Kowalski was depressed and that in my opinion the depression was caused and exacerbated by the conduct of Karen Thompson during her visits to Sharon Kowalski. It is apparent from the records that Karen Thompson was giving very negative messages to Sharon Kowalski about her parents and about the quality of care that she was receiving at Park Point Manor Nursing Home in Duluth, and her medical care. It was my opinion that Sharon was receiving adequate medical care and nursing home care;

5. At this hearing I also testified that if I had been Sharon's attending physician rather than her psychiatric consultant, I would issue an order banning any contact between Karen Thompson and Sharon Kowalski;

6. I also testified that I have treated gay and lesbian persons and that many gay and lesbian persons do not wish to have their sexual preference or orientation disclosed to third parties, and that many of them keep this a secret. I also testified that gay and lesbian persons most fear disclosure of their sexual preference and orientation to their parents. It is my opinion that the right of disclosure of one's sexual orientation and sexual preference is uniquely an individual's own prerogative;

7. It is my opinion, based upon my examinations and perusal of the medical and nursing home records, that Sharon Kowalski remains profoundly brain damaged and

I agree with the rehabilitation conference report that is hereto attached as Exhibit B;

8. One of the outstanding things that I agree with in this evaluation is on page 3, fourth line from the bottom, which reads in part " . . . her cognitive functioning ability would be below a 6 or 7 year age level . . . . " The entire initial evaluation and history dated October 9, 1984, which took place over a number of days after she was admitted to Nat Polinsky Rehabilitation Unit at Miller/Dwan Hospital and Medical Center on September 14, 1984, was seen and read by myself and used by me in forming my opinions relative to Sharon Kowalski;

9. Sharon Kowalski remains profoundly mentally and physically disabled and this condition is permanent. My opinion remains that total control of Sharon's life should remain in the hands of her parents. I have found through the years that parental love is unconditional and lasting, whereas other associations, many times, disintegrate when there is a change in the status of one of the parties. This would be true in both heterosexual and homosexual relationships, in my opinion;

10. From what I have been able to observe and from consulting with all of her health care personnel at the hospital and nursing home, Sharon Kowalski's parents are doing a commendable and adequate job in administering and looking over their daughter, Sharon Kowalski;

11. It is my further opinion that the notorious publicity given to this matter by the press conferences, television, and news releases of Karen Thompson, and the disclosure of these press releases and news releases by Karen Thompson to Sharon Kowalski, have caused the conflict to

be laid upon Sharon Kowalski and have caused her to be insecure and fearful, therefore throwing her into depression;

12. Therefore, based upon the history, my own examinations, my perusal and study of the hospital and nursing home records, and my interviews of medical and nursing home personnel, it remains my opinion that any contact by Karen Thompson with Sharon Kowalski should be eliminated; it is my further opinion that the continued conflict in this matter creates a very dangerous situation for Sharon Kowalski;

13. In preparation for the making of this affidavit I was given a copy of an affidavit of Janlori Goldman dated August 5, 1985, attached hereto as Exhibit C, and a copy of an affidavit of Amy B. Bromberg dated August 6, 1985, attached hereto as Exhibit D. In both of these affidavits questions relative to representation by attorneys from the Minnesota Civil Liberties Union were asked of Sharon Kowalski and references were made to courts and court procedures;

14. It is my opinion based upon the history, the rehabilitation conference report dated October 9, 1984, conversations with her medical and nursing home personnel, perusal of medical and nursing home records, conferences with her attending physicians, and my own examination of Sharon Kowalski, that she would be unable to understand the questions and use the complex reasoning that would be required to give intelligent answers;

15. The whole, entire history shows that Sharon's brain damage causes her to be totally confused in answering questions. It is my opinion and belief that Sharon

does not have sufficient understanding to make reasoned, intelligent answers to the questions as shown in these affidavits;

16. It is my further opinion that the types of questioning and indication of conflict are very harmful to Sharon Kowalski as I had testified at the trial that similar questions and creating of conflict were harmful to Sharon Kowalski. These would be no different;

FURTHER AFFIANT SAITH NOT Except this affidavit is made for the purpose of indicating to the Court my reasons for my opinion of eliminating contact by Karen Thompson with Sharon Kowalski.

/s/ George M. Cowan, M.D.

Subscribed and sworn to before
me this 27 day of August, 1985.

/s/ Elizabeth Petrovic
Notary Public
(SEAL)

Supreme Court, U.S.
FILED
MAR 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1303

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

SHARON KOWALSKI,

Petitioner,

vs.

DONALD KOWALSKI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

REPLY OF PETITIONER

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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TO THE MINNESOTA SUPREME COURT

REPLY OF PETITIONER

The arguments of respondent Donald Kowalski, guardian, like the opinion of the Minnesota Court of Appeals, highlight the troublesome issues before this Court. Sharon Kowalski desires her *own* representation in proceedings that determine, among other things, the scope of her incapacity and the extent of control that a guardian or conservator may have over her. For tactical reasons, her guardian, who is directly adverse to her on these issues, filed a motion in the Minnesota Court of Appeals to have her counsel removed. The Court of Appeals,

without directing an evidentiary hearing on Sharon's retention of counsel, prohibited The Minnesota Civil Liberties Union (the "MCLU") and a reputable Minneapolis law firm not only from representing Sharon, but also from associating with her court-appointed counsel.

Sharon's position is that she has both the capacity and the right to choose counsel, particularly where it costs the state and her estate nothing. The Catch-22 response of the Court of Appeals and her guardian is that, while she has a right to a hearing and appeal to contest her general capacity, she must rely on counsel appointed by the probate court because it "appears" that she lacks the capacity to choose a lawyer.[1] Due process requires more.

The factual substance of the guardian's response in this Court—the so-called medical reports—are letters obtained by guardian's counsel for purposes of litigation and selective excerpts, from an extensive factual record, that reflect little of what went on in the trial court. Neither the trial court nor the appellate court relied on the guardian's bill of particulars. As an aside, after three meetings with Sharon, both Amy Bromberg and Janlori Goldman believe Sharon retained them.

With regard to retention of counsel, the Minnesota Court of Appeals held that "it *appears* the trial court has determined the ward is incapable of independently retaining counsel . . ." The Minnesota Court of Appeals also held that "court-appointed counsel had *apparently* not been authorized to associate with the MCLU attorneys . . ." The Court of Appeals did not rely on the un-crossexamined paper solicited by the

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[1] Alternatively stated, Sharon has a right to a hearing and appeal but she has to use counsel that does not threaten her adversary. The only court we know of where such procedures pass muster is the one run by Lewis Carroll's Queen of Hearts.

guardian's counsel for purposes of his motion practice. The sole basis of the Court of Appeals' action was supposition about what the trial court did and did not do.

The Court of Appeals disenfranchised counsel by assumption and left Sharon without the counsel she chose. The issues before this Court deal with whether the lower courts can, by supposition, summarily disenfranchise counsel in civil proceedings that are as important to individual liberty as criminal actions. There is no guidance from this Court on the substantive or procedural rights of someone in Sharon's situation to counsel of choice. Without such guidance, other courts will treat the right to counsel with the same cavalier attitude as did the Minnesota Court of Appeals.

Dated: March 14, 1986.

Respectfully submitted,

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